1–7–09 Wednesday
Vol. 74 No. 4 Jan. 7, 2009

Pages 609–768

Federal Register

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.federalregister.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge as one of the databases on GPO Access, a service of the U.S. Government Printing Office.

The online edition of the **Federal Register** *www.gpoaccess.gov/nara,* available through GPO Access, is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 59, Number 1 (January 2, 1994) forward.

For more information about GPO Access, contact the GPO Access User Support Team, call toll free 1-888-293-6498; DC area 202-512-1530; fax at 202-512-1262; or via e-mail at *gpoaccess@gpo.gov.* The Support Team is available between 7:00 a.m. and 9:00 p.m. Eastern Time, Monday–Friday, except official holidays.

The annual subscription price for the **Federal Register** paper edition is $749 plus postage, or $808, plus postage, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $165, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Printing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 74 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Printing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**

Single copies/back copies:

Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**

FEDERAL AGENCIES

Subscriptions:

Paper or fiche	**202–741–6005**
Assistance with Federal agency subscriptions	**202–741–6005**

FEDERAL REGISTER WORKSHOP

THE FEDERAL REGISTER: WHAT IT IS AND HOW TO USE IT

FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: Sponsored by the Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.

2. The relationship between the Federal Register and Code of Federal Regulations.

3. The important elements of typical Federal Register documents.

4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, January 27, 2009
9:00 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

Contents

Federal Register

Vol. 74, No. 4

Wednesday, January 7, 2009

Reader Aids
Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Federal Register
Vol. 74, No. 4
Wednesday, January 7, 2009

Presidential Documents

Title 3—

The President

Proclamation 8333 of December 30, 2008

National Mentoring Month, 2009

By the President of the United States of America

A Proclamation

During National Mentoring Month, we recognize the millions of individuals who dedicate themselves to making a difference in the lives of others, and we underscore our commitment to supporting these soldiers in America's armies of compassion.

Every day across our great Nation, men and women of many different backgrounds work to inspire our next generation of leaders. By sharing their time and experiences, mentors help instill important values that encourage America's youth to set high goals and achieve their dreams. Mentors demonstrate that the strength of our Nation lies in the hearts and souls of our citizens and that a positive influence in someone's life helps them secure a more hopeful future.

My Administration has been committed to building a culture of service, citizenship, and responsibility. Through the Mentoring Children of Prisoners program, volunteers help provide consistent guidance and support so that these children can lead lives of opportunity and achievement. The USA Freedom Corps is strengthening mentoring opportunities in America and spreading a message of hope across our Nation. The Helping America's Youth initiative, led by First Lady Laura Bush, motivates caring adults to connect with youth to help them to grow up to be responsible and successful adults. By working together, we can enrich the lives of our next generation and continue a legacy of kindness and encouragement.

I appreciate our Nation's mentors and all those who contribute to their community by helping to change a child's life. For more information on volunteering to be a mentor, visit volunteer.gov. During National Mentoring Month, we honor the many Americans who have touched the lives of others with their compassion, and we reflect on their efforts toward building a stronger and brighter future for all.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim January 2009 as National Mentoring Month. I call upon the people of the United States to recognize the importance of mentoring, to look for opportunities to serve as mentors in their communities, and to observe this month with appropriate activities and programs.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of December, in the year of our Lord two thousand eight, and of the Independence of the United States of America the two hundred and thirty-third.

[FR Doc. E9–113
Filed 1–6–09; 8:45 am]
Billing code 3195–W9–P

Federal Register
Vol. 74, No. 4
Wednesday, January 7, 2009

Presidential Documents

Title 3—

The President

Proclamation 8334 of December 31, 2008

To Extend Duty-Free Treatment for Certain Agricultural Products of Israel and for Other Purposes

By the President of the United States of America

A Proclamation

1. On April 22, 1985, the United States and Israel entered into the Agreement on the Establishment of a Free Trade Area between the Government of the United States of America and the Government of Israel (USIFTA), which the Congress approved in the United States-Israel Free Trade Area Implementation Act of 1985 (the ''USIFTA Act'') (19 U.S.C. 2112 note).

2. In order to maintain the general level of reciprocal and mutually advantageous concessions with respect to agricultural trade with Israel, on July 27, 2004, the United States entered into an agreement with Israel concerning certain aspects of trade in agricultural products during the period January 1, 2004, through December 31, 2008 (the ''2004 Agreement''). The 2004 Agreement reflects an effort by the United States and Israel to address, through 2008, their continuing differences over the meaning of certain provisions in the USIFTA governing access for U.S. agricultural products to Israel's market.

3. Section 4(b) of the USIFTA Act provides that, whenever the President determines that it is necessary to maintain the general level of reciprocal and mutually advantageous concessions with respect to Israel provided for by the USIFTA, the President may proclaim such withdrawal, suspension, modification, or continuance of any duty, or such continuance of existing duty-free or excise treatment, or such additional duties as the President determines to be required or appropriate to carry out the USIFTA.

4. In Proclamation 7826 of October 4, 2004, consistent with the 2004 Agreement, I proclaimed modifications to the Harmonized Tariff Schedule of the United States (HTS) to provide duty-free access into the United States through December 31, 2008, for specified quantities of certain agricultural products of Israel.

5. On December 10, 2008, the United States entered into an agreement with Israel to extend the period that the 2004 Agreement is in force through December 31, 2009, to allow additional time for the two governments to conclude an agreement to replace the 2004 Agreement.

6. Pursuant to section 4(b) of the USIFTA Act, I have determined that it is necessary, in order to maintain the general level of reciprocal and mutually advantageous concessions with respect to Israel provided for by the USIFTA, to provide duty-free access into the United States through the close of December 31, 2009, for specified quantities of certain agricultural products of Israel.

7. On June 6, 2003, the United States and Chile entered into the United States-Chile Free Trade Agreement (USCFTA). The Congress approved the USCFTA in section 101(a) of the United States-Chile Free Trade Agreement Implementation Act (the ''USCFTA Act'') (19 U.S.C. 3805 note). In Proclamation 7746 of December 30, 2003, I proclaimed the tariff treatment called for under the USCFTA.

8. Section 201(b) of the USCFTA Act authorizes the President, subject to the consultation and layover requirements of section 103(a) of the USCFTA Act, to proclaim such modifications to the staging of duty treatment set forth in Annex 3.3 of the USCFTA as the United States may agree to with Chile, as the President determines to be necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions with respect to Chile provided for by the USCFTA.

9. On November 26, 2008, the United States entered into an agreement with Chile that includes an accelerated schedule of duty elimination under the USCFTA for specific originating goods of Chile. The consultation and layover requirements of section 103(a) of the USCFTA Act with respect to the accelerated schedule of duty elimination were satisfied as of November 8, 2008.

10. Pursuant to section 201(b) of the USCFTA Act, I have determined that modifications hereinafter proclaimed of rates of duties on originating goods of Chile are necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions with respect to Chile provided for by the USCFTA and to carry out the agreement with Chile on an accelerated schedule of duty elimination for specific originating goods of Chile.

11. On May 18, 2004, the United States and Australia entered into the United States-Australia Free Trade Agreement (USAFTA). The Congress approved the USAFTA in section 101(a) of the United States-Australia Free Trade Agreement Implementation Act (the ''USAFTA Act'') (19 U.S.C. 3805 note). In Proclamation 7857 of December 20, 2004, I proclaimed the rules of origin called for under the USAFTA.

12. Section 203(o) of the USAFTA Act authorizes the President, subject to the consultation and layover requirements of section 104 of the USAFTA Act, to proclaim such modifications to the rules of origin as are necessary to implement an agreement with Australia pursuant to article 4.2.5 of the USAFTA.

13. On October 10, 2008, the United States entered into an agreement with Australia pursuant to article 4.2.5 of the USAFTA to amend the USAFTA rule of origin for certain yarns of viscose rayon fiber. The consultation and layover requirements of section 104 of the USAFTA Act with respect to the proposed modification of the USAFTA rules of origin were satisfied as of December 24, 2008.

14. Section 604 of the Trade Act of 1974, as amended (the ''1974 Act'') (19 U.S.C. 2483), authorizes the President to embody in the HTS the substance of relevant provisions of that Act, or other acts affecting import treatment, and of actions taken thereunder.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, acting under the authority vested in me by the Constitution and the laws of the United States of America, including section 4 of the USIFTA Act, section 201(b) of the USCFTA Act, section 203(o) of the USAFTA Act, section 604 of the 1974 Act, and section 301 of title 3, United States Code, do proclaim that:

(1) In order to implement U.S. tariff commitments under the 2004 Agreement through December 31, 2009, the HTS is modified as provided in Annex I to this proclamation.

(2)(a) The modifications to the HTS made by Annex I to this proclamation shall be effective with respect to goods that are the product of Israel and are entered, or withdrawn from warehouse for consumption, on or after January 1, 2009.

(b) The provisions of subchapter VIII of chapter 99 of the HTS, as modified by Annex I to this proclamation, shall continue in effect through December 31, 2009.

(3) In order to provide for an accelerated schedule of duty elimination for specific originating goods of Chile, the tariff treatment set forth in the HTS is modified as provided in Annex II to this proclamation.

(4) The modifications made to the HTS by Annex II to this proclamation shall be effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after January 1, 2009.

(5) In order to implement the agreement with Australia to change the USAFTA rules of origin for certain yarns of viscose rayon fiber, the HTS is modified as provided in Annex III to this proclamation.

(6) The modifications made to the HTS by Annex III to this proclamation shall enter into effect on the date that the United States Trade Representative announces in a notice published in the *Federal Register* that Australia has completed its applicable domestic procedures to give effect to the agreement to change the USAFTA rules of origin for certain yarns of viscose rayon fiber and shall be effective with respect to originating goods of Australia entered, or withdrawn from warehouse for consumption, on or after the date indicated in the notice.

(7) Any provisions of previous proclamations and Executive Orders that are inconsistent with the actions taken in this proclamation are superseded to the extent of such inconsistency.

IN WITNESS WHEREOF, I have hereunto set my hand this thirty-first day of December, in the year of our Lord two thousand eight, and of the Independence of the United States of America the two hundred and thirty-third.

Billing code 3195–W9–P

ANNEX I

Effective with respect to eligible agricultural products of Israel which are entered, or withdrawn from warehouse for consumption, on or after January 1, 2009 and before the close of December 31, 2009, subchapter VIII of chapter 99 of the Harmonized Tariff Schedule of the United States is hereby modified as follows:

1. U.S. note 1 to such subchapter is modified by deleting "December 31, 2008" and by inserting in lieu thereof "December 31, 2009".

2. U.S. note 3 to such subchapter is modified by adding at the end of the tabulation the following material, in the two columns specified in such note: "Calendar year 2009 466,000".

3. U.S. note 4 to such subchapter is modified by adding at the end of the tabulation the following material, in the two columns specified in such note: "Calendar year 2009 1,304,000".

4. U.S. note 5 to such subchapter is modified by adding at the end of the tabulation the following material, in the two columns specified in such note: "Calendar year 2009 1,534,000".

5. U.S. note 6 to such subchapter is modified by adding at the end of the tabulation the following material, in the two columns specified in such note: "Calendar year 2009 131,000".

6. U.S. note 7 to such subchapter is modified by adding at the end of the tabulation the following material, in the two columns specified in such note: "Calendar year 2009 707,000".

ANNEX II

MODIFICATIONS TO THE HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES WITH RESPECT TO THE TARIFF TREATMENT OF CERTAIN GOODS ORIGINATING IN THE TERRITORY OF CHILE

Effective with respect to originating goods of Chile under the terms of general note 26 to the Harmonized Tariff Schedule of the United States (HTS) that are entered, or withdrawn from warehouse for consumption, on or after January 1, 2009, the rates of duty 1-special subcolumn of column 1 for each of the tariff provisions enumerated below is modified by deleting the rate of duty set forth in such subcolumn and the "(CL)" symbol following such rate and by inserting "CL,", in alphabetical order, in the parentheses following the "Free" rate of duty in such subcolumn:

0710.22.40
0710.30.00
0710.40.00
0710.80.97
0710.90.91
2005.99.80

ANNEX III

TO MODIFY CERTAIN RULES OF ORIGIN FOR THE AUSTRALIA-UNITED STATES FREE TRADE AGREEMENT

Effective with respect to goods of Australia under the terms of general note 28 to the Harmonized Tariff Schedule of the United States (HTS) that are entered, or withdrawn from warehouse for consumption, on or after the date announced by the United States Trade Representative in a notice published in the Federal Register, subdivision (n) of general note 28 is hereby modified as follows:

1. Tariff classification rule (TCR) 1 for chapter 55 is deleted.

2. The following new TCRs are inserted in numerical sequence:

"1.	A change to subheadings 5501.00 through 5510.30 from any other chapter, except from headings 5201 through 5203 or 5401 through 5405.
1A.	A change to subheading 5510.90 from subheading 5504.10 or from any other chapter, except from headings 5201 through 5203 or 5401 through 5405.
1B.	A change to heading 5511 from any other chapter, except from headings 5201 through 5203 or 5401 through 5405."

[FR Doc. E9–115
Filed 1–6–09; 8:45 am]
Billing code 7020–02–C

Rules and Regulations

Federal Register
Vol. 74, No. 4
Wednesday, January 7, 2009

BOARD OF DIRECTORS OF THE HOPE FOR HOMEOWNERS PROGRAM

24 CFR Part 4001

[Docket No. B–2009–F–03]

RIN 2580–AA01

HOPE for Homeowners Program: Program Regulations: Upfront Payment Incentive for Subordinate Mortgage Lien Holders and Other Program Changes

AGENCY: Board of Directors of the HOPE for Homeowners Program.

ACTION: Interim final rule.

SUMMARY: This interim final rule amends the HOPE for Homeowners Program regulations established by the Board of Directors (Board) of the HOPE for Homeowners Program (Program) and published on October 6, 2008. The regulations are being amended to provide additional flexibility and options to lenders as authorized by amendments to section 257 of the National Housing Act made by the Emergency Economic Stabilization Act, which was signed into law on October 3, 2008, and to make additional changes designed to improve the Program. Specifically, the regulations are amended to expand the Program to include 2-to-4 unit properties as eligible Program properties, which is consistent with the definition of ''single family residence'' under the National Housing Act. The regulations are also amended to provide for the option of an upfront payment in lieu of a future appreciation payment from the Secretary of Housing and Urban Development (Secretary) to a holder of an existing subordinate mortgage. The upfront payment would be offered by the Secretary as an incentive to facilitate agreement by all mortgage lien holders to release their liens on the mortgage to be refinanced under the Program. The amendments made by this rule also include increasing the maximum term of Program mortgages from 30 to 40 years, as well as increasing or modifying the allowable loan-to-value and debt-to-income ratios for new mortgages under the Program. The regulations are also amended to modify the equity sharing provision of the Program for borrowers who may have equity in their homes at the time they are accepted into the Program, and to make the timeframe for lenders to obtain endorsement for Program loans consistent with other FHA programs.

All these amendments are designed to expand the number of eligible borrowers and participating lenders and servicers, and improve the Program's operations consistent with the requirements and purposes of the Program. In addition, the regulations are amended to clarify the provisions regarding mortgagor eligibility, total monthly mortgage payment, and shared appreciation in the value of the refinanced property.

DATES: *Effective Date:* January 7, 2009.

Comment Due Date: March 9, 2009.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500. Communications should refer to the above docket number and title.

Comment by Mail. Please note that due to security measures at all federal agencies, submission of comments by mail often results in delayed delivery.

Electronic Submission of Comments. HUD now accepts comments electronically. Interested persons may now submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* HUD *strongly encourages* commenters to submit comments electronically. Electronic submission allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available for public viewing. Commenters should follow the instructions provided at *http://www.regulations.gov* to submit comments electronically.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable. In all cases, communications must refer to the docket number and title.

Public Inspection of Public Comments. All comments and communications submitted will be available, without revision, for inspection and downloading at *http://www.regulations.gov.* Comments are also available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the Regulations Division. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the comments by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Emmanuel Yeow, Secretary of the Board of Directors of the HOPE for Homeowners Program, Department of Housing and Urban Development, 451 7th Street, SW., Room 9110, Washington, DC 20410–8000, telephone 202–708–3600 (this is not a toll-free number). Persons with hearing-or speech-impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

The HOPE for Homeowners Act of 2008 (Title IV of Division A of the Housing and Economic Recovery Act of 2008 (HERA), (Pub. L. 110–289, 122 Stat. 2654, approved July 30, 2008)), amended Title II of the National Housing Act (NHA) to add a new section 257. New section 257 (12 U.S.C. 1701z–22) establishes within the Federal Housing Administration (FHA), the Program, a temporary FHA program that offers homeowners and mortgage loan holders (or servicers acting on their behalf) insurance on the refinancing of loans for distressed mortgagors to support long term sustainable homeownership and avoid foreclosure. Section 257 of the NHA authorizes the Department of Housing and Urban Development (HUD) acting through FHA, to insure such refinanced eligible mortgages commencing no earlier than October 1, 2008, and the authority to insure new mortgages expires September 30, 2011.

On September 30, 2008, the Board approved regulations that established the core requirements necessary and appropriate for implementation of the Program. These regulations were

published in the **Federal Register** on October 6, 2008, at 73 FR 58418.

Under the Program, refinanced mortgages are offered by FHA-approved mortgagees to eligible borrowers who are at risk of losing their homes to foreclosure. The refinanced mortgage insured by FHA has a principal loan balance below the current appraised value of the home, creating new equity in the mortgaged property. To participate in the Program, eligible borrowers must be unable to afford their existing mortgage payments, must occupy the residence that is the security for the refinanced mortgage as their primary residence, and may not have any present ownership interest in another residence. Investors and investor properties are not eligible for the Program. Under the Program, participating mortgagors share their new equity and future appreciation of the value of the property subject to the refinanced mortgage with FHA. Participation in this Program is voluntary. No mortgagees, servicers, or investors are compelled to participate.

Under the Program, all holders of outstanding mortgage liens on a property to which a mortgage relates must agree to accept the proceeds of the refinanced FHA-insured loan as payment in full of all indebtedness under the existing mortgage(s). The Secretary is directed by HERA to take actions, subject to standards established by the Board, to facilitate coordination and agreement between the holders of the existing senior mortgage and existing subordinate mortgages.

On October 3, 2008, the President signed into law the Emergency Economic Stabilization Act of 2008 (Pub. L. 110–343, 122 Stat. 3765) (EESA). Section 124 of EESA amended section 257 of the NHA to, among other things, authorize the Secretary, subject to standards established by the Board, to make upfront payments to a holder of an existing subordinate mortgage in lieu of providing the subordinate lien holder a portion of HUD's 50 percent interest in the future appreciation of the value of the property. Upfront payments may provide a more effective incentive to subordinate lien holders to release their liens on a mortgage eligible to be refinanced under the Program, thereby better enabling a borrower to participate in the Program. In addition, section 124 of EESA amended section 257(e)(1)(B) of the NHA to clarify that a borrower's debt-to-income ratio may be calculated for purposes of that section as of March 1, 2008, or may be calculated as of a later date, due to mortgage resets that occur after that date under the mortgage terms in effect on March 1, 2008. Finally, section 124 of EESA amended section 257 of the NHA to give the Board discretionary authority to raise the maximum loan-to-value ratio of a Program mortgage, which was set prior to the amendment at 90 percent.

This Interim Final Rule

This interim final rule makes the following changes to the Program regulations at 24 CFR part 4001:

A. Upfront Payment in Lieu of a Future Appreciation Payment

As authorized by section 124 of EESA, this interim final rule amends the Board's regulations at 24 CFR 4001.120 (Appreciation Sharing) to permit a holder of an existing subordinate mortgage to receive a payment at the time a mortgage is refinanced under the Program in lieu of a share of any future appreciation in the value of the property that is owed to HUD. As a condition of receiving such payment, the subordinate mortgage holder must release the borrower of all indebtedness under the loan and release the holder's lien on the property.

The following matrix, codified as Appendix A to the Program regulations, provides the mechanism for determining the risk-adjusted future appreciation payment a holder of an existing subordinate mortgage may be eligible to receive. The Appendix is amended by this final rule to reflect the risk-adjusted upfront payment a holder of an existing subordinate mortgage may be eligible to receive in lieu of the future appreciation payment. Appendix A is also amended to provide that, when calculating a subordinate mortgage lien holder's potential appreciation share, payment will be based upon principal and interest ''as of the first day of the month in which the borrower makes application for the Program mortgage'' (as opposed to the ''date of origination of the Program mortgage,'' as provided for in the appendix to the final rule issued on October 6, 2008). These amendments are necessary because subordinate mortgage lien holders must be notified in advance of origination of the amount of any upfront or future appreciation share they may be eligible to receive, and they must agree in writing to accept one of these payment options. If the upfront option is selected, the originating lender must provide payment instructions to the closing agent in advance of origination. If the future appreciation option is selected, HUD must prepare and deliver the Appreciation Share Certificate prior to origination.

CALCULATION OF UPFRONT AND APPRECIATION SHARING PAYMENT

Subordinate mortgage lien holder's cumulative combined loan-to-value ratio	Upfront payment option Percent of unpaid principal and interest that lien holder is eligible to receive # (percent)	Future appreciation option* Percent of unpaid principal and interest that lien holder is eligible to receive # (percent)
>135%	3	9
≤135%	4	12

*A payment to a subordinate mortgage lien holder will depend on actual appreciation of the property, as determined in accordance with 24 CFR 4001.120. Payment will be made according to the subordinate lien holder's position of priority in relation to the property at the time the Program mortgage is originated.

#Payment will be based upon principal and interest as of the first day of the month in which the borrower made application for the Program mortgage and calculated at the pre-default contract rate of interest.

In establishing the upfront payment option, the Board took into account information received from market participants concerning the price currently received in the market for delinquent subordinate mortgages. The Board expects that the majority of subordinate mortgage liens to be released under the Program will be delinquent. The information provided by market participants indicates that delinquent subordinate mortgages recently have traded at substantially below their par values, with market values that approximate the ranges established by the Board for the upfront payment option. As a result, the Board believes that the compensation provided

by the upfront payment option at the time of settlement should be sufficient to facilitate the participation of subordinate mortgage lien holders in the Program. The Board believes that providing an upfront payment option of 3 to 4 percent, as provided in this interim final rule, should likely provide the subordinate mortgage lien holder with about the same risk-adjusted compensation as the holder would receive under the right to receive a maximum of 9 to 12 percent of the unpaid principal and interest on the subordinate mortgage out of the future appreciation on the property (as is provided in the final regulations published on October 6, 2008). The upfront payment option will be subject to the same eligibility requirements as the future appreciation option.

B. Increased Loan-to-Value and Income Ratios

This interim final rule amends § 4001.110 (Underwriting) to increase the allowable loan-to-value ratio (LTV) of a Program mortgage up to 96.5 percent for any mortgagor whose: (i) New total monthly mortgage payment under the Program mortgage will not exceed 31 percent of the mortgagor's monthly gross income, and (ii) total monthly recurring expenses (including mortgage payments) will not exceed 43 percent of the mortgagor's monthly gross income. This amendment is designed to promote Program participation by existing senior mortgage lien holders. Raising the LTV could reduce the gap between the existing mortgage balance and the new Program mortgage, reducing losses that existing primary lien holders may incur in connection with a Program mortgage. At the same time, the changes seek to ensure the new Program mortgage is sustainable by limiting the permissible DTI ratios to 31/43 percent for borrowers with a new LTV of greater than 90 percent. The rule also amends § 4001.110 to allow a mortgagor whose Program mortgage has an LTV that does not exceed 90 percent to qualify immediately for the Program, without any trial modification period, if: (i) The mortgagor's new total monthly mortgage payments will not exceed 38 percent of the mortgagor's monthly gross income; and (ii) the mortgagor's monthly recurring expenses (including mortgage expenses) will not exceed 50 percent of monthly gross income. The trial modification requirement will no longer be required under the Program, and the provisions related to trial modification are removed by this rule.

Together these amendments should expand the number of eligible borrowers that may qualify for the Program and reduce the operational hurdles and other disincentives for lenders or servicers to participate in the Program. At the same time, the amendments balance a borrower's resulting LTV and mortgage debt- and total household debt-to-income ratios to help create a sustainable new mortgage for the borrower.

C. Extending Program Mortgage Terms From 30 to 40 Years

The rule amends the Program regulations at § 4001.110(c) to extend the maximum term of a Program mortgage from 30 to 40 years. Section 257(e)(5)(B) of the NHA requires a mortgage refinanced under the Program to have a term ''not less than'' 30 years, meaning that a longer term is possible. A conforming change is made to § 4001.102, which cross-references the applicability of HUD's regulations governing eligibility for single family mortgage insurance at 24 CFR part 203, subpart A. Specifically, the rule amends § 4001.102 to specify that the provisions of 24 CFR 203.17(d) limiting the term of a HUD-insured mortgage to 30 years are not applicable to the Program.

For mortgagors with very high mortgage and household debt loads, extending the amortization period may reduce their monthly payments sufficiently to enable them to qualify for the Program. Whether a particular borrower would obtain a lower monthly payment through a 40 year mortgage will depend on, among other things, the applicable interest rate. In order for a Program mortgage to qualify for inclusion in a pool of Program mortgages to back securities guaranteed by the Government National Mortgage Association (Ginnie Mae), the mortgage should be for a term of either 30 or 40 years to maintain consistency in the mortgages within a securitization pool. If the lender intends to hold the Program mortgage or securitize the mortgage other than through the Ginnie Mae program, then this operational limitation would not apply, and the lender is free to set the term of the mortgage at 30 years, 40 years, or some intermediate number of years.

D. Mortgagor Eligibility, Total Monthly Mortgage Payment, and Shared Appreciation and Shared Equity Requirements

Under the explicit authority granted by section 257(e)(1)(B) of the NHA, this rule amends the Program regulations at 24 CFR 4001.106 (Eligible mortgagors) to provide additional flexibility for homeowners with adjustable rate mortgages to meet the requirement that the mortgagor must have had on March 1, 2008, ''or thereafter is likely to have, due to the terms of the mortgage being reset,'' a total monthly mortgage payment of more than 31 percent of the mortgagor's monthly gross income. As under the current Program regulations, any mortgagor will meet this requirement if the mortgagor had, as of March 1, 2008, a total monthly mortgage payment of more than 31 percent of the mortgagor's monthly gross income. In addition, this rule amends the existing Program regulations to permit a mortgagor that had an adjustable rate senior or subordinate mortgage on March 1, 2008, that by its terms resets after March 1, 2008, to alternatively qualify for the Program if the mortgagor has, *as of the date the mortgagor first applies for the Program mortgage*, a total monthly mortgage payment under mortgages existing on March 1, 2008, of more than 31 percent of the mortgagor's monthly gross income at the time of application for the Program mortgage. This rule amends 24 CFR 4001.106 to reflect this new, alternative qualification option for borrowers who had a qualifying adjustable-rate mortgage on March 1, 2008.

As under the current Program regulations, a borrower's ''total monthly mortgage payment'' is based on the borrower's fully indexed and fully amortizing principal and interest payment under the terms of the mortgage, as well as amounts required to be paid for real estate taxes, hazard and mortgage insurance, and certain other fees and charges. (*See* 24 CFR 4001.07 (Definition of total monthly mortgage payment).) This rule also amends § 4001.106(a) to correct a technical error by replacing ''monthly total mortgage payment'' with the defined term ''total monthly mortgage payment.''

This interim final rule also makes certain modifications to the provisions regarding the calculation of shared appreciation at § 4001.120 (Appreciation sharing). The regulation at § 4001.120(a)(1) currently provides that the amount of appreciation in the value of a property securing a Program mortgage will be calculated, subject to certain adjustments, based on the ''gross proceeds from the sale or disposition of the property.'' A non-sale disposition of a property, however, may not involve the transfer of any proceeds. In addition, a sale transaction between the borrower and a related party (including a person acting on behalf of the mortgagor or a related party) may not accurately reflect the appreciation in the value of the underlying property. In light of the foregoing, the rule amends § 4001.120 to

provide that, for purposes of the appreciation sharing provisions of the rule, the appreciation in the value of a property will, subject to certain adjustments, be based on (1) the gross proceeds of a sales transaction, unless the transaction is with or on behalf of a related party, and (2) the current appraised value of the property in the case of a non-sale disposition of the property or the sale of the property to a related party or a person acting on behalf of a related party. The definitions section of the rule (12 CFR 4001.07) also has been amended to include a definition of a ''related party'' of a person. This definition includes the immediate family of the person, as well as entities owned or controlled by the person or the person's immediate family.

E. Eligibility of Two-to-Four Unit Properties

The rule amends § 4001.07 (Definitions) and § 4001.108 (Eligible properties) to expand the types of residential properties that are eligible to serve as security for a Program mortgage to include a 2-to-4 unit residence. After further review of section 257 of the NHA, the Board determined that the term ''residence'' as used in section 257 may include a 2-to-4 unit residence, which is consistent with how such term is applied under section 203(b) of the NHA.[1] The Board also concluded that expansion of the Program to include a 2-to-4 unit residence would allow more borrowers to participate in the Program, especially in certain geographic areas, such as the Northeast, where 2-to-4 unit residences are more prevalent. Notwithstanding whether the property has 1, 2, 3, or 4 unit(s), the residence must be the borrower's primary residence, as this term is defined in § 4001.07, and the borrower cannot have an interest in any residential property other than the subject 1-to-4 unit residence.

F. Clarification of Initial Equity

Under section 257 of the NHA and the current regulations, a borrower must share with HUD the amount of ''equity'' created as a direct result of the origination of a Program mortgage. The amount of such ''initial'' equity that a borrower must share with HUD, under the existing regulations, is based (subject to certain adjustments) on the difference between the property's current appraised value at the time of origination of the Program mortgage and the principal amount of the new Program mortgage. Consequently, under the existing regulations, if a borrower has some existing equity in the home at the time the borrower enters the Program, this equity would have to be shared with HUD. In order to prevent such an unintended result, this rule modifies the calculation of equity sharing in § 4001.118. Under the modified calculation of initial equity to be shared with HUD, lenders should deduct the original principal balance on the Program mortgage from the lesser of: (1) The appraised value of the property at the time of origination; or (2) the outstanding amount due under all existing senior mortgages, existing subordinate mortgages, and non-mortgage liens on the property.

G. Endorsement Timeframe

Currently under § 4001.116(d), a mortgagee must submit a complete case binder within 120 days from the date of closing for a mortgage to be eligible for insurance. The timeframe for lenders to obtain endorsement for Program loans has been expanded so that it is consistent with other FHA programs. To ensure that lenders comply with the first payment default provision established in the law, the Board will continue to require the lender to include in the file evidence that the borrower has made the first payment within 120 days of loan closing. If the borrower has not made such payment, the loan would not be eligible for payment of a claim under the Program.

III. Findings and Certifications

Administrative Procedure Act

Section 553(a) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) Section 553(a) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) (APA) provides that advance notice and public comment procedures do not apply to a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts (see 5 U.S.C. 553(a)). Because this rule amends regulations for a new mortgage insurance program under the supervision of the Board, it is exempt from notice and comment rulemaking as provided in 5 U.S.C. 553(a). Nevertheless, the Board has determined to request public comment on these interim final rule amendments, which are effective upon publication in the **Federal Register**. The Board will consider any public comments received in fulfilling its responsibilities under section 257 of the NHA and will respond to comments when the Board takes final action on this interim final rule.

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, *Regulatory Planning and Review.* OMB determined that this rule is a ''significant regulatory action'' as defined in section 3(f) of the Order (although not an economically significant regulatory action, as provided under section 3(f)(1) of the Order). The first Program regulations promulgated by the Board were determined to be economically significant and an economic analysis accompanied issuance of the first Program regulations. It has been determined that the amendments made by this rule do not by themselves meet the threshold of economic significance set forth in the executive order. As noted in the preamble description of the economic analysis prepared for the October 6, 2008 final rule, the major unknown for purposes of an economic analysis is Program participation. Participation to date has been lower than expected under the original analysis for the October 6, 2008 final rule. Though changes under this rule would likely expand participation, the increment is not expected to reach the threshold for economic significance. Although the analysis of the amendments made by this rule does not anticipate increased participation that would result in crossing the threshold for economic significance, these changes are expected to increase the cost to the Federal government of insuring Program mortgages, as the amendments made by this rule are expected to transfer additional risk to the Federal government.

The docket file for this rule is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at (202) 402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service at (800) 877–8339.

Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism

[1] Section 257(v) of the NHA states that the provisions and requirements of section 203(b) of the NHA should apply with respect to the Program, except as otherwise provided in section 257 of the NHA or by the Board.

implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments nor preempts state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule will not impose any federal mandates on any state, local, or tribal governments or the private sector within the meaning of UMRA.

List of Subjects in 24 CFR Part 4001

Administrative procedures, Practice and procedure, Mortgage insurance, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Board of Directors of the HOPE for Homeowners Program amends the regulations in part 4001 in Title 24 of the Code of Federal Regulations to read as follows:

Chapter XXIV—Board of Directors of the HOPE for Homeowners Program

PART 4001—HOPE FOR HOMEOWNERS PROGRAM

■ 1. The authority of 24 CFR part 4001 continues to read as follows:

Authority: 12 U.S.C. 1701z–22.

■ 2. In § 4001.07, insert the definition of ''Related party'' to follow the definition of ''Program mortgage'' to read as follows:

§ 4001.07 Definitions.

* * * * *

Related party of a person means any of the following or another person acting on behalf of the person or any of the following—

(1) The person's father, mother, stepfather, stepmother, brother, sister, stepbrother, stepsister, son, daughter, stepson, stepdaughter, grandparent, grandson, granddaughter, father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, the spouse of any of the foregoing, and the person's spouse;

(2) Any entity of which 25 percent or more of any class of voting securities is owned, controlled or held in the aggregate by the person or the persons referred to in paragraph (1); and

(3) Any entity of which the person or any person referred to in paragraph (1) serves as a trustee, general partner, limited partner, managing member, or director.

* * * * *

■ 3. In § 4001.102(a), add the phrase ''203.17(d) Maturity;'' immediately following the phrase ''203.16 Certificate and contract regarding use of dwelling for transient or hotel purposes;''.

■ 4. Revise § 4001.106 to read as follows:

§ 4001.106 Eligible mortgagors.

A mortgagor shall be eligible to refinance his or her existing mortgages under section 257 of the Act only if:

(a)(1) The mortgagor had, on March 1, 2008, a total monthly mortgage payment (based on mortgages outstanding on March 1, 2008) of more than 31 percent of the mortgagor's monthly gross income; or

(2) If the mortgagor's existing senior mortgage or existing subordinate mortgage, if any, is an adjustable-rate mortgage that by its terms resets after March 1, 2008, the mortgagor has a total monthly mortgage payment (based on mortgages outstanding on March 1, 2008) of more than 31 percent of the mortgagor's monthly gross income calculated as of the date the mortgagor first applies for the Program mortgage;

(b) The mortgagor does not have an ownership interest in any other residential property;

(c) The mortgagor has not been convicted of fraud under federal or state law in the past 10 years;

(d) The mortgagor certifies that the mortgagor has not intentionally defaulted on any mortgage or debt and has not knowingly, or willfully and with actual knowledge, furnished material information known to be false for purposes of obtaining any Program mortgage; and

(e) The mortgagor meets such other requirements as the Board may adopt.

■ 5. Revise § 4001.108(a) to read as follows:

§ 4001.108 Eligible properties.

(a) A mortgage may be insured under the Program only if the property that is to be the security for the mortgage is a 1-to-4 unit residence.

* * * * *

■ 6. In § 4001.110, revise paragraphs (a) and (c) to read as follows:

§ 4001.110 Underwriting.

* * * * *

(a) *Loan-to-value and income thresholds.* The loan-to-value (LTV), payment-to-income, and debt-to-income ratios of the Program mortgage do not exceed the thresholds set forth in either paragraph (a)(1) or (a)(2) of this section.

(1) *Program mortgage with LTV ratio of 90 percent or less.* (i) The initial principal balance of the Program mortgage as a percentage of the current appraised value of the property does not exceed 90 percent;

(ii) The total monthly mortgage payment of the mortgagor under the Program mortgage does not exceed 38 percent of the mortgagor's monthly gross income; and

(iii) The sum of the total monthly mortgage payment under the Program mortgage and all monthly recurring expenses of the mortgagor does not exceed 50 percent of the mortgagor's monthly gross income.

(2) *Program mortgage with up to 96.5 percent LTV.* (i) The initial principal balance of the Program mortgage as a percentage of the current appraised value of the property does not exceed 96.5 percent;

(ii) The total monthly mortgage payment of the mortgagor under the Program mortgage does not exceed 31 percent of the mortgagor's monthly gross income; and

(iii) The sum of the total monthly mortgage payment under the Program mortgage and all monthly recurring expenses of the mortgagor does not exceed 43 percent of the mortgagor's monthly gross income.

* * * * *

(c) The Program mortgage shall have a maturity of not less than 30 years and not more than 40 years from the date of origination.

* * * * *

■ 7. In § 4001.116, revise paragraphs (d) and (e) to read as follows:

§ 4001.116 Representations and prohibitions.

* * * * *

(d) *FHA insurance.* A mortgage is eligible for insurance if the mortgagee submits a complete case binder within such time period as the Board prescribes. The binder shall include evidence acceptable to the Board that the mortgage is current.

(e) *Mortgagor failure to make first mortgage payment.* FHA shall not pay a mortgage insurance claim to any mortgagee if the first total monthly mortgage payment is not made within 120 days from the date of closing of the mortgage. The mortgagee shall not, directly or indirectly, make all or a part of the first total monthly mortgage

payment on behalf of the mortgagor. The mortgagee is prohibited from escrowing funds at closing for all or part of the first total monthly mortgage payment.

■ 8. Revise § 4001.118(a)(1) to read as follows:

§ 4001.118 Equity sharing.

(a) *Initial Equity.* For purposes of section 257(k)(1) of the Act, the initial equity created as a direct result of the origination of a Program mortgage on a property, as calculated by the Program mortgage lender, shall equal:

(1) The lesser of—

(i) The appraised value of the property that was used at the time of origination of the Program mortgage to underwrite the mortgage and to determine compliance with the maximum loan-to-value ratio at origination established by section 257(e)(2)(B) of the Act; or

(ii) The outstanding amount due under all existing senior mortgages, existing subordinate mortgages, and non-mortgage liens on the property; less

* * * * *

■ 9. In § 4001.120, revise the heading, revise paragraphs (a)(1) and (c)(2), and add paragraph (e) to read as follows:

§ 4001.120 Appreciation sharing or upfront payment.

(a) * * *

(1) In the case of—

(i) A sale of the property to one or more persons none of which is a related party of the mortgagor, the gross proceeds from the sale of the property; or

(ii) A disposition of the property or the sale of the property to a related party of the mortgagor, the current appraised value of the property at the time of the disposition or sale; less

* * * * *

(c) * * *

(2) The amount of the unpaid principal and interest on such existing subordinate mortgage, as of the first day of the month in which the mortgagor made application for the Program mortgage, is at least $2,500; and

* * * * *

(e) *Election to receive upfront payment in lieu of a share of appreciation.* Upon meeting the requirements of paragraph (c) of this section, the eligible holder(s) of an existing subordinate mortgage on a property securing a Program mortgage may elect to receive, contemporaneously with the origination of the Program mortgage, a payment from FHA in an aggregate amount determined in accordance with the formula provided in Appendix A to this part in lieu of any right to receive a portion of FHA's 50 percent interest in the future appreciation in the appraised value of such property under paragraph (c) of this section.

■ 10. Appendix A to part 4001, including its heading, is revised to read as follows:

APPENDIX A TO PART 4001—CALCULATION OF UPFRONT PAYMENT OR FUTURE APPRECIATION PAYMENT

Subordinate mortgage lien holder's cumulative combined loan-to-value ratio	Upfront payment option Percent of unpaid principal and interest that lien holder is eligible to receive # (percent)	Future appreciation option* Percent of unpaid principal and interest that lien holder is eligible to receive # (percent)
>135%	3	9
≤135%	4	12

*A payment to a subordinate mortgage lien holder will depend on actual appreciation of the property as determined in accordance with 24 CFR 4001.120. Payment will be made according to the subordinate lien holder's position of priority in relation to the property at the time the Program mortgage is originated.

#Payment will be based upon principal and interest as of the first day of the month in which the borrower made application for the Program mortgage, calculated at the pre-default contract rate of interest.

Dated at Washington, DC, this 31st day of December 2008.

By order of the Board of Directors of the HOPE for Homeowners Program

Brian D. Montgomery,

Chairman of the Board.

[FR Doc. E9–57 Filed 1–6–09; 8:45 am]

BILLING CODE 4210–AA–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3020

[Docket Nos. MC2009–10 and CP2009–12; Order No. 162]

International Mail Contracts

AGENCY: Postal Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Commission is adding Inbound International Expedited Services 2 to the Competitive Product List. This action is consistent with changes in a recent law governing postal operations and a recent Postal Service request. Republication of the lists of market dominant and competitive products is also consistent with new requirements in the law.

DATES: Effective January 7, 2009.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.*

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 and *stephen.sharfman@prc.gov.*

SUPPLEMENTARY INFORMATION: *Regulatory History,* 73 FR 74212 (December 5, 2008).

The Postal Service seeks to add a new product identified as Inbound International Expedited Services 2 to the Competitive Product List. For the reasons discussed below, the Commission approves the Request.

I. Background

On November 19, 2008, the Postal Service filed a request pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.* to add Inbound International Expedited Services 2 to the Competitive Product List.[1] The Postal Service asserts that Inbound International Expedited Services 2 is a competitive product within the meaning of 39 U.S.C. 3632(b)(3). This Request has been assigned Docket No. MC2009–10.

The Postal Service contemporaneously filed notice, pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5, that the Governors have established prices and classifications not of general applicability for Inbound Express Mail International (EMS)

[1] Request of the United States Postal Service Regarding Inbound Express Mail International (EMS) from Foreign Posts to Add Inbound International Expedited Services 2 to Competitive Product List; and Notice of Establishment of Rates and Classifications Not of General Applicability, November 19, 2008 (Request).

originating from foreign posts.[2] The Governors' Decision establishes EMS prices pursuant to the Universal Postal Union's (UPU) EMS Cooperative procedures which permit each participating destination postal administration to change its charges effective January 1 of each year by notifying its partners directly or through the UPU's International Bureau by August 31 of the year prior to the effective date.[3] The Postal Service generally provides notice through the UPU International Bureau. Governors' Decision at 1, n.2.

Under the EMS Cooperative procedures, destination posts set prices for the following three pricing tiers:

1. Pay-For-Performance. Available EMS Cooperative members who elect to comply with pay-for-performance provisions. These rates also will apply to members of the Kahala Post Group;[4]

2. EMS Cooperative. EMS Cooperative members who elect not to comply with pay-for-performance provisions; and

3. All Others. International posts who choose not to be members of the EMS Cooperative. Request at 2.

With the exception of Inbound International Expedited Services 1 involving a bilateral agreement with the China Post Group, the Postal Service proposes that the three price tiers applicable to EMS for foreign posts whose prices are set pursuant to this process be classified as a single product, Inbound International Expedited Services 2.[5]

In support of its Request, the Postal Service filed a redacted version of the Governors' Decision establishing prices and classifications for Inbound Express Mail International.[6] The Postal Service also filed a Statement of Supporting Justification as required by 39 CFR 3020.32,[7] certification of the Governors' vote,[8] and certification of compliance with 39 U.S.C. 3633(a).[9] In addition, the Postal Service filed an unredacted copy of the Governors' Decision, the agreements with foreign posts, and other supporting documents designed to establish compliance with 39 CFR 3015.5 under seal. Request at 1, n.2.

In the Statement of Supporting Justification, Brian T. Hutchins, Manager, International Postal Relations, discusses the possibility that the Postal Service could have requested that the new product be merged with Inbound International Expedited Services 1. He notes that the prices for inbound EMS are established through bilateral negotiation (*e.g.*, China Post Group) or unilaterally pursuant to the EMS Cooperative procedures.

He further states that the Request recognizes that the ''price changes for EMS were locked down in August 2008 and this is the first experience putting prices set by this method through Commission review under the [Postal Accountability and Enhancement Act (PAEA)].'' Request, Attachment 2, at 2. The Postal Service views its Request as the simplest approach. *Id.* He observes, however, that the Commission could determine that inbound EMS from foreign posts be included with the existing inbound EMS product (Inbound International Expedited Services 1). Hutchins concludes that either approach ''will improve the Postal Service's competitive posture, while enabling the Commission to verify that prices set according to EMS Cooperative procedures cover their attributable costs and make a positive contribution to coverage of institutional costs.'' *Id.* at 2–3.

W. Ashley Lyons, Manager, Corporate Financial Planning, Finance Department, certifies that the Inbound EMS prices comply with 39 U.S.C. 3633(a). Request, Attachment 4. He asserts that the EMS agreement ''prices demonstrate that EMS should cover its attributable costs and preclude the subsidization of competitive products by market dominant products.'' *Id.*

The Postal Service filed much of the supporting materials, including the Governors' Decision and the EMS agreements with foreign posts, under seal. It maintains that the EMS agreements with foreign posts, related financial information, and the Governors' Decision should remain under seal as they contain pricing, cost, and other information that are highly confidential. Request at 5.

The Postal Service classification changes established for existing EMS agreements (except for the China Post Group) in the Governors' Decision are scheduled to take effect January 1, 2009 after review by the Commission. Governors' Decision at 3.

In Order No. 141, the Commission gave notice of the two dockets, appointed a public representative, and provided the public with an opportunity to comment.[10] The Postal Service responded to the Chairman's Information Request No. 1 on December 12, 2008. It filed an errata on December 18, 2008.[11]

II. Comments

Comments were filed by the Public Representative and International Transport Solutions, Inc. (ITS). The Postal Service filed a reply to ITS' comments.[12]

The Public Representative focuses principally on confidentiality and the adequacy of cost coverage in the agreement.[13] Public Representative Comments 2–4. The Public Representative concludes that the Postal Service provides sufficient justification for the filing of materials under seal. He further notes that the cost coverage in the agreement should generate sufficient revenue so that there is no subsidization of international inbound EMS negotiated service agreements by market dominant products. Public Representative Comments at 4.

ITS is in the international mail consolidation industry.[14] Its market represents the import and export of bulk international mail generated from organizations. ITS Comments at 1. It focuses on section 407(e)(2) of title 39

[2] The Postal Service states that at the time of Governors' Decision No. 08–20 in this proceeding, EMS prices met all requirements of the financial model which is reflected in the decision. The financial model filed under seal in the instant case provides inputs that became available subsequent to the Governors' vote. This model as filed has an anomaly because the margin is slightly below the threshold set by the Governors. However, the Postal Service contends that this difference should not impact the Commission's approval of the prices that were established in August 2008 and that the cost coverage presented in the model as filed is above 100 percent and satisfies the statutory pricing criteria for competitive products. Request at 4, n.9.

[3] Request, Attachment 1, at 1, *see also* Request at 2.

[4] The Kahala Post Group is a group of postal administrations that in 2003 agreed to work together to improve international postal services, particularly for express and package services.

[5] Request at 4. *See* PRC Order No. 84, Order Concerning the China Post Group Inbound EMS Agreement, Docket No. CP2008–7, June 27, 2008.

[6] *See* Attachment 1 to the Request.

[7] *See* Attachment 2 to the Request.

[8] *See* Attachment 3 to the Request.

[9] *See* Attachment 4 to the Request.

[10] PRC Order No. 141, Notice and Order Concerning Adding Inbound International Expedited Services 2 to Competitive Product List, December 1, 2008 (Order No. 141).

[11] Response of United States Postal Service to Chairman's Information Request No. 1 and Notice of Filing Responsive Materials (Under Seal), December 12, 2008; United States Postal Service Notice of Filing Errata to Response to Chairman's Information Request No. 1, and Notice of Filing Errata to Financial Materials (Under Seal), December 18, 2008.

[12] Reply to Comments of William Gensburg of International [Transport] Solutions, December 15, 2008 (Postal Service Reply).

[13] Public Representative Comments in Response to United States Postal Service Request to Add Inbound International Expedited Services 2 to the Competitive Product List, and Establishment of Rates and Classifications Not of General Applicability, December 5, 2008 (Public Representative Comments).

[14] Comments of William Gensburg of International Transport Solutions, Inc., December 9, 2008 (ITS Comments). This filing was accompanied by a Motion for Late Acceptance of Comments of William Gensburg of International Transport Solutions, Inc. pursuant to Order No. 141, December 9, 2008. The motion is granted.

regarding application of customs laws to shipments of competitive products by the Postal Service and similar shipments by private companies. It contends that the Postal Service enjoys special regulatory advantages not available to others which it states is in direct contradiction to the requirements of the PAEA. ITS asserts the Postal Service enjoys singular customs advantages for all international mail. *Id.* ITS concludes that approval of the Inbound International Expedited Services 2 product will not comport with the PAEA's mandate until the customs laws of the United States change so that all shipments by international delivery companies, including the Postal Service, are treated equally. *Id.* at 1–2.

In its reply, the Postal Service contends that ITS has not shown that it is a ''private company'' within the context of 407(e)(1) or shown that it makes similar shipments to those imported or exported by the Postal Service. Postal Service Reply at 1. The Postal Service also argues that the organization does not present issues which are proper for consideration by the Commission or address whether the operational agreements or UPU-managed price setting procedures comply with 39 U.S.C. 3633. *Id.* at 2. It further contends that ITS does not provide information on consumer or small business concerns about the placement of the product on the Competitive Product List. The Postal Service argues that section 407(e)(2) of title 39 is not relevant to this proceeding. *Id.*

III. Commission Analysis

The Commission has reviewed the contract, the financial analysis provided under seal that accompanies it, the supplemental information filed by the Postal Service in response to the Chairman's Information Request No. 1, and the parties' comments.

The Commission's statutory responsibilities in this instance entail assigning Inbound International Expedited Services 2 to either the Market Dominant Product List or to the Competitive Product List. 39 U.S.C. 3642. As part of this responsibility, the Commission also reviews the proposal for compliance with the PAEA, including sections 3632, 3633, and 3642 of title 39.

Product list assignment. In determining whether to assign the Inbound International Expedited Services 2 as a product to the Market Dominant Product List or the Competitive Product List, the Commission must consider whether the Postal Service exercises sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products.

39 U.S.C. 3642(b)(1). If so, the product will be categorized as market dominant. The competitive category of products shall consist of all other products.

The Commission is further required to consider the availability and nature of enterprises in the private sector engaged in the delivery of the product, the views of those who use the product, and the likely impact on small business concerns. 39 U.S.C. 3642(b)(3).

The Postal Service describes the product as involving Inbound Express Mail International from foreign posts for delivery in the Postal Service's domestic service area. It proposes that it be added as a new competitive product called Inbound International Expedited Services 2. Request at 1, Attachment 2 at 1. The Postal Service asserts that it does not have the market power to set its prices substantially above costs, to raise prices significantly, or to decrease quality of output. Request, Attachment 2, at 3. It asserts that its bargaining position is constrained by the existence of other shippers who can provide similar services, thus precluding it from taking unilateral action to increase prices without the risk of losing volume to private companies. *Id.*

The Postal Service argues inbound EMS falls outside the Private Express Statutes. It suggests that the relevant market can be served by ''[p]rivate consolidators, freight forwarders, and integrators'' who offer ''quick end-to-end delivery of matter that could also be sent and delivered via EMS.'' *Id.* at 4.

Based on his review of the filing, the Public Representative concludes that the Postal Service's proposal complies with title 39, and that its Request fulfills all relevant requirements of the Commission Rules of Practice and Procedure. Public Representative Comments at 5.

ITS does not oppose the classification of Inbound International Expedited Services 2 as a competitive product. Rather, it argues that accepting the Postal Service's request ''cannot comport with the PAEA's mandate'' until customs laws change so that shipments for the Postal Service and competing international delivery companies are treated equally. ITS Comments at 2. While the Commission appreciates ITS' concerns, the issues it raises are beyond the scope of this proceeding. The issues presented by the Postal Service's filing are whether the proposal is consistent with the policies of sections 3632, 3633, and 3642 of title 39. If ITS believes that the regulatory advantages it cites fall within the Commission's purview, it would need to develop its claim more fully.

Having considered the statutory requirements, comments filed by the parties and the support offered by the Postal Service, the Commission finds that Inbound International Expedited Services 2 is appropriately classified as a competitive product and should be added to the Competitive Product List.

Cost considerations. The Governor's Decision states that the price floor formula provides greater than 100 percent coverage of the costs attributable to each of the price tiers. *Id.* Attachment 1 at 2. The Postal Service provided data under seal which permitted analysis of the underlying agreements individually, by tier, and as a whole. The Postal Service's Representative, W. Ashley Lyons, certifies that the price formula is designed to ensure that each agreement should cover its attributable costs and preclude the subsidization of competitive products by market dominant products.

Based on the data submitted and the comments received, the Commission finds that Inbound International Expedited Services 2 should cover its attributable costs (39 U.S.C. 3633(a)(2)), should not lead to the subsidization of competitive products by market dominant products (39 U.S.C. 3633(a)(1)), and should have a positive effect on competitive products' contribution to institutional costs (39 U.S.C. 3633(a)(3)). Thus, an initial review of Inbound International Expedited Services 2 indicates that it comports with the provisions applicable to rates for competitive products.

Procedural considerations. The Postal Service indicates that the EMS prices established by the Governors are produced pursuant to EMS Cooperative procedures. Report, Attachment 1 at 1. The EMS Cooperative is a voluntary group established by the UPU's Postal Operations Council. *Id.* at 1, n.1. Hutchins notes that the Request represents the ''first experience putting prices set by this method through Commission review under the PAEA.'' *Id.,* Attachment 2 at 2. The Commission has concerns with the timing of the Request.

The EMS Cooperative requires that new rates to take effect January 1 of the coming year be communicated to the UPU and EMS partners by August 31. There is no opportunity for an EMS Cooperative member to change its rates for the coming year after August 31. The

Postal Service notes that the EMS prices for 2009 ''were locked down in August 2008.'' *Id.* at 4, n.9. The Commission's subsequent review of these rates after August 31 is therefore problematic. If a product is found to violate the PAEA, *e.g.*, does not satisfy section 3633(a)(2), the Postal Service may be without a suitable remedy until the next rate change is permitted for the following year, in this case 2010. However, no change of filed rates is required in this record.

In response to Order 84, the Postal Service filed a list of ongoing International Expedited Services Agreements.[15] The Postal Service is directed to file a similar public list organizing the instant agreements to be grouped under each of the three tiers of Inbound International Expedited Services 2. The Postal Service should also notify the Commission on a quarterly basis of additional participation by postal administrations in Pay-For-Performance and the effective date. The Postal Service shall also promptly notify the Commission if the prices terminate earlier than December 31, 2009, but no later than the actual termination date.

The revision to the Competitive Product List is shown below the signature of this Order and is effective upon issuance of this order.

It is Ordered:

1. Inbound International Expedited Services 2 (MC2009–10 and CP2009–12) is added to the Competitive Product List as a new product under Express Mail, Inbound International Expedited Services.

2. As discussed in the body of this order, the Postal Service shall file a list of the instant agreements to be grouped under each of the three price tiers.

3. The Postal Service shall notify the Commission if any prices terminate earlier than December 31, 2009, and of changes to countries listed in each of the three price tiers on a quarterly basis.

4. The Secretary shall arrange for the publication of this Order in the **Federal Register**.

List of Subjects in 39 CFR Part 3020

Administrative practice and procedure, Postal Service.

By the Commission.

Steven W. Williams,

Secretary.

■ For the reasons stated in the preamble, under the authority at 39 U.S.C. 503, the Postal Regulatory Commission amends 39 CFR part 3020 as follows:

PART 3020—PRODUCT LISTS

■ 1. The authority citation for part 3020 continues to read as follows:

Authority: 39 U.S.C. 503; 3622; 3631; 3642; 3682.

■ 2. Revise Appendix A to subpart A of part 3020—Mail Classification to read as follows:

Appendix A to Subpart A of Part 3020—Mail Classification Schedule

Part A—Market Dominant Products
1000 Market Dominant Product List
First-Class Mail
  Single-Piece Letters/Postcards
  Bulk Letters/Postcards
  Flats
  Parcels
  Outbound Single-Piece First-Class Mail International
  Inbound Single-Piece First-Class Mail International
Standard Mail (Regular and Nonprofit)
  High Density and Saturation Letters
  High Density and Saturation Flats/Parcels
  Carrier Route
  Letters
  Flats
  Not Flat-Machinables (NFMs)/Parcels
Periodicals
  Within County Periodicals
  Outside County Periodicals
Package Services
  Single-Piece Parcel Post
  Inbound Surface Parcel Post (at UPU rates)
  Bound Printed Matter Flats
  Bound Printed Matter Parcels
  Media Mail/Library Mail
Special Services
  Ancillary Services
  International Ancillary Services
  Address List Services
  Caller Service
  Change-of-Address Credit Card Authentication
  Confirm
  International Reply Coupon Service
  International Business Reply Mail Service
  Money Orders
  Post Office Box Service
Negotiated Service Agreements
  HSBC North America Holdings Inc. Negotiated Service Agreement
  Bookspan Negotiated Service Agreement
  Bank of America Corporation Negotiated Service Agreement
  The Bradford Group Negotiated Service Agreement
Market Dominant Product Descriptions
First-Class Mail
[Reserved for Class Description]
  Single-Piece Letters/Postcards
  [Reserved for Product Description]
  Bulk Letters/Postcards
  [Reserved for Product Description]
  Flats
  [Reserved for Product Description]
  Parcels
  [Reserved for Product Description]
  Outbound Single-Piece First-Class Mail International
  [Reserved for Product Description]
  Inbound Single-Piece First-Class Mail International
  [Reserved for Product Description]
Standard Mail (Regular and Nonprofit)
[Reserved for Class Description]
  High Density and Saturation Letters
  [Reserved for Product Description]
  High Density and Saturation Flats/Parcels
  [Reserved for Product Description]
  Carrier Route
  [Reserved for Product Description]
  Letters
  [Reserved for Product Description]
  Flats
  [Reserved for Product Description]
  Not Flat-Machinables (NFMs)/Parcels
  [Reserved for Product Description]
Periodicals
[Reserved for Class Description]
  Within County Periodicals
  [Reserved for Product Description]
  Outside County Periodicals
  [Reserved for Product Description]
Package Services
[Reserved for Class Description]
  Single-Piece Parcel Post
  [Reserved for Product Description]
  Inbound Surface Parcel Post (at UPU rates)
  [Reserved for Product Description]
  Bound Printed Matter Flats
  [Reserved for Product Description]
  Bound Printed Matter Parcels
  [Reserved for Product Description]
  Media Mail/Library Mail
  [Reserved for Product Description]
Special Services
[Reserved for Class Description]
  Ancillary Services
  [Reserved for Product Description]
  Address Correction Service
  [Reserved for Product Description]
  Applications and Mailing Permits
  [Reserved for Product Description]
  Business Reply Mail
  [Reserved for Product Description]
  Bulk Parcel Return Service
  [Reserved for Product Description]
  Certified Mail
  [Reserved for Product Description]
  Certificate of Mailing
  [Reserved for Product Description]
  Collect on Delivery
  [Reserved for Product Description]
  Delivery Confirmation
  [Reserved for Product Description]
  Insurance
  [Reserved for Product Description]
  Merchandise Return Service
  [Reserved for Product Description]
  Parcel Airlift (PAL)
  [Reserved for Product Description]
  Registered Mail
  [Reserved for Product Description]
  Return Receipt
  [Reserved for Product Description]
  Return Receipt for Merchandise
  [Reserved for Product Description]
  Restricted Delivery
  [Reserved for Product Description]
  Shipper-Paid Forwarding
  [Reserved for Product Description]
  Signature Confirmation
  [Reserved for Product Description]
  Special Handling
  [Reserved for Product Description]

[15] *See* Docket No. 2008–7, United States Postal Service Response to Order No. 84 and Notice of Filing Ongoing Inbound International Expedited Services Agreements, July 23, 2008.

Stamped Envelopes
[Reserved for Product Description]
Stamped Cards
[Reserved for Product Description]
Premium Stamped Stationery
[Reserved for Product Description]
Premium Stamped Cards
[Reserved for Product Description]
International Ancillary Services
[Reserved for Product Description]
International Certificate of Mailing
[Reserved for Product Description]
International Registered Mail
[Reserved for Product Description]
International Return Receipt
[Reserved for Product Description]
International Restricted Delivery
[Reserved for Product Description]
Address List Services
[Reserved for Product Description]
Caller Service
[Reserved for Product Description]
Change-of-Address Credit Card Authentication
[Reserved for Product Description]
Confirm
[Reserved for Product Description]
International Reply Coupon Service
[Reserved for Product Description]
International Business Reply Mail Service
[Reserved for Product Description]
Money Orders
[Reserved for Product Description]
Post Office Box Service
[Reserved for Product Description]
Negotiated Service Agreements
[Reserved for Class Description]
HSBC North America Holdings Inc. Negotiated Service Agreement
[Reserved for Product Description]
Bookspan Negotiated Service Agreement
[Reserved for Product Description]
Bank of America Corporation Negotiated Service Agreement
The Bradford Group Negotiated Service Agreement
Part B—Competitive Products
2000 Competitive Product List
Express Mail
Express Mail
Outbound International Expedited Services
Inbound International Expedited Services
Inbound International Expedited Services 1 (CP2008–7)
Inbound International Expedited Services 2 (MC2009–10 and CP2009–12)
Priority Mail
Priority Mail
Outbound Priority Mail International
Inbound Air Parcel Post
Parcel Select
Parcel Return Service
International
International Priority Airlift (IPA)
International Surface Airlift (ISAL)
International Direct Sacks—M-Bags
Global Customized Shipping Services
Inbound Surface Parcel Post (at non-UPU rates)
Canada Post—United States Postal Service Contractual
Bilateral Agreement for Inbound Competitive Services (MC2009–8 and CP2009–9)
International Money Transfer Service
International Ancillary Services
Special Services
Premium Forwarding Service
Negotiated Service Agreements
Domestic
Express Mail Contract 1 (MC2008–5)
Express Mail Contract 2 (MC2009–3 and CP2009–4)
Express Mail & Priority Mail Contract 1 (MC2009–6 and CP2009–7)
Express Mail & Priority Mail Contract 2 (MC2009–12 and CP2009–14)
Parcel Return Service Contract 1 (MC2009–1 and CP2009–2)
Parcel Return Select & Parcel Return Service Contract 1 (MC2009–11 and CP2009–13)
Priority Mail Contract 1 (MC2008–8 and CP2008–26)
Priority Mail Contract 2 (MC2009–2 and CP2009–3)
Priority Mail Contract 3 (MC2009–4 and CP2009–5)
Priority Mail Contract 4 (MC2009–5 and CP2009–6)
Outbound International
Global Expedited Package Services (GEPS) Contracts
GEPS 1 (CP2008–5, CP2008–11, CP2008–12, and CP2008–13, CP2008–18, CP2008–19, CP2008–20, CP2008–21, CP2008–22, CP2008–23 and CP2008–24)
Global Plus Contracts
Global Plus 1 (CP2008–9 and CP2008–10)
Global Plus 2 (MC2008–7, CP2008–16 and CP2008–17)
Global Direct Contracts (MC2009–9, CP2009–10 and CP2009–11)
Inbound Direct Entry Contracts with Foreign Postal Administrations (MC2008–6, CP2008–14 and CP2008–15)
Competitive Product Descriptions
Express Mail
[Reserved for Group Description]
Express Mail
[Reserved for Product Description]
Outbound International Expedited Services
[Reserved for Product Description]
Inbound International Expedited Services
[Reserved for Product Description]
Priority
[Reserved for Product Description]
Priority Mail
[Reserved for Product Description]
Outbound Priority Mail International
[Reserved for Product Description]
Inbound Air Parcel Post
[Reserved for Product Description]
Parcel Select
[Reserved for Group Description]
Parcel Return Service
[Reserved for Group Description]
International
[Reserved for Group Description]
International Priority Airlift (IPA)
[Reserved for Product Description]
International Surface Airlift (ISAL)
[Reserved for Product Description]
International Direct Sacks—M-Bags
[Reserved for Product Description]
Global Customized Shipping Services
[Reserved for Product Description]
International Money Transfer Service
[Reserved for Product Description]
Inbound Surface Parcel Post (at non-UPU rates)
[Reserved for Product Description]
International Ancillary Services
[Reserved for Product Description]
International Certificate of Mailing
[Reserved for Product Description]
International Registered Mail
[Reserved for Product Description]
International Return Receipt
[Reserved for Product Description]
International Restricted Delivery
[Reserved for Product Description]
International Insurance
[Reserved for Product Description]
Negotiated Service Agreements
[Reserved for Group Description]
Domestic
[Reserved for Product Description]
Outbound International
[Reserved for Group Description]
Part C—Glossary of Terms and Conditions
[Reserved]
Part D—Country Price Lists for International Mail [Reserved]

[FR Doc. E9–58 Filed 1–6–09; 8:45 am]
BILLING CODE 7710–FW–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 19

[FRL–8760–4]

RIN 2020–AA46

Civil Monetary Penalty Inflation Adjustment Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction.

SUMMARY: This action contains a minor correction to the final Civil Monetary Penalty Inflation Adjustment Rule, which was published on December 11, 2008 (73 FR 75340) and will be effective on January 12, 2009. As mandated by the Debt Collection Improvement Act (DCIA), the rule adjusts for inflation the statutory civil penalties that may be assessed for violations of EPA-administered statutes and their implementing regulations. A corrected version of Table 1 of the regulation appears at the end of this action.

DATES: This correction is effective January 12, 2009.

FOR FURTHER INFORMATION CONTACT: David Abdalla, Special Litigation and Projects Division (2248A), Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, (202) 564–2413.

SUPPLEMENTARY INFORMATION:

I. Background

On December 11, 2008, EPA issued the final Civil Monetary Penalty

Inflation Adjustment Rule (''2008 penalty inflation rule'' or ''rule''), as mandated by the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note, to adjust for inflation the statutory civil penalties that may be assessed for violations of EPA-administered statutes and their implementing regulations (73 FR 75340). Effective January 12, 2009, the rule at 40 CFR 19.4 adjusts, in accordance with the formula mandated by the DCIA, the maximum and the minimum amounts of each statutory civil penalty that can be imposed under EPA-administered statutes. Although the current version of 40 CFR 19.4 lists all of the penalty assessment authorities and the applicable statutory maximum amounts that can be imposed under the Safe Drinking Water Act (SDWA), 42 U.S.C. 300f–300j, EPA inadvertently deleted four SDWA statutory citations and their corresponding penalty amounts in Table 1 of the rule published on December 11, 2008.

II. Need for Correction

As published, the regulatory text in the final rule contains an error that, if not corrected, would result in an error in Table 1 of 40 CFR 19.4 in the next publication of the Code of Federal Regulations. Specifically, the rule as published deleted: four citations to penalty authorities under the SDWA; the statutory maximum penalties that can be assessed under the SDWA, as enacted; and the statutory maximum penalties that can be assessed pursuant to the penalty inflation adjustment rules published by EPA in 1996, 2004 and 2008 (*see* 61 FR 69360 (December 31, 1996); 69 FR 7121 (February 13, 2004); and 73 FR 75340 (December 11, 2008)).

The penalty inflation adjustment rules, including the 2008 rule, are mandated by the DCIA, which requires each federal agency to apply statutorily prescribed formula to calculate inflation-adjusted penalties. Section 553(b)(3)(B) of the Administrative Procedures Act (APA), 5 U.S.C. 553(b)(3)(B), provides that, when an Agency for good cause finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest, the Agency may issue a rule without providing notice and an opportunity for public comment. In the December 11, 2008 notice, EPA found good cause, pursuant to APA Section 553(b)(3)(B), that soliciting public comment prior to the publication of the final rule was not necessary because EPA is carrying out a ministerial, non-discretionary duty pursuant to a mandate from Congress under the DCIA. Because the Agency has no discretion under the DCIA to vary the amount of any penalty adjustment to reflect any views or suggestions provided by public commenters, EPA decided that there would be no purpose in providing an opportunity for public comment on the 2008 penalty inflation rule.

This action merely amends Table 1 of 40 CFR 19.4 to reinsert the four missing SDWA penalty authorities, together with their corresponding statutory maximum penalty amounts since the SDWA was originally enacted, and reflect that the penalties in effect after January 12, 2009 under these authorities have been adjusted in accordance with the DCIA's non-discretionary formula. Accordingly, like the 2008 penalty inflation rule, EPA has determined that there is good cause for making this action final without prior proposal and opportunity for comment because the change to the rule is a minor technical correction, is non-controversial, and merely applies the formula mandated under the DCIA. Similarly, because this change is technical in nature and is consistent with the statutorily mandated formula applied in the 2008 penalty inflation rule, EPA has also determined that this technical correction rule meets the ''good cause'' exception to the effective date requirements of section 553(d) of the APA. Consequently, this technical correction will be effective on January 12, 2009, the same date the 2008 penalty inflation rule will take effect.

III. Corrections to Publication

In FR Doc. E8–29380 appearing on page 75345 in the **Federal Register** of December 11, 2008, the following correction is made:

Table 1 of Section 19.4 [Corrected]

Beginning on page 75345, Table 1 of Section 19.4—Civil Monetary Penalty Inflation Adjustments, is corrected to read as follows:

§ 19.4 Penalty adjustment and table.

* * * * *

TABLE 1—OF SECTION 19.4 CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. code citation	Environmental statute	Statutory penalties, as enacted	Penalties effective after January 30, 1997 through March 15, 2004	Penalties effective after March 15, 2004 through January 12, 2009	Penalties effective after January 12, 2009
7 U.S.C. 136l.(a)(1)	FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA).	$5,000	$5,500	$6,500	$7,500
7 U.S.C. 136l.(a)(2)	FIFRA	500/1,000	550/1,000	650/1,100	750/1,100
15 U.S.C. 2615(a)(1)	TOXIC SUBSTANCES CONTROL ACT (TSCA)	25,000	27,500	32,500	37,500
15 U.S.C. 2647(a)	TSCA	5,000	5,500	6,500	7,500
15 U.S.C. 2647(g)	TSCA	5,000	5,000	5,500	7,500
31 U.S.C. 3802(a)(1)	PROGRAM FRAUD CIVIL REMEDIES ACT (PFCRA).	5,000	5,500	6,500	7,500
31 U.S.C. 3802(a)(2)	PFCRA	5,000	5,500	6,500	7,500
33 U.S.C. 1319(d)	CLEAN WATER ACT (CWA)	25,000	27,500	32,500	37,500
33 U.S.C. 1319(g)(2)(A)	CWA	10,000/25,000	11,000/ 27,500	11,000/32,500	16,000/37,500
33 U.S.C. 1319(g)(2)(B)	CWA	10,000/ 125,000	11,000/ 137,500	11,000/ 157,500	16,000/ 177,500
33 U.S.C. 1321(b)(6)(B)(i).	CWA	10,000/25,000	11,000 /27,500	11,000/32,500	16,000/37,500
33 U.S.C. 1321(b)(6)(B)(ii).	CWA	10,000/ 125,000	11,000/ 137,500	11,000/ 157,500	16,000/ 177,500
33 U.S.C. 1321(b)(7)(A)	CWA	25,000/1,000	27,500/1,100	32,500/1,100	37,500/1,100
33 U.S.C. 1321(b)(7)(B)	CWA	25,000	27,500	32,500	37,500
33 U.S.C. 1321(b)(7)(C)	CWA	25,000	27,500	32,500	37,500

TABLE 1—OF SECTION 19.4 CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. code citation	Environmental statute	Statutory penalties, as enacted	Penalties effective after January 30, 1997 through March 15, 2004	Penalties effective after March 15, 2004 through January 12, 2009	Penalties effective after January 12, 2009
33 U.S.C. 1321(b)(7)(D)	CWA	100,000/3,000	110,000/3,300	130,000/4,300	140,000/4,300
33 U.S.C. 1415(a)	MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT (MPRSA).	50,000/ 125,000	55,000/ 137,500	65,000/ 157,500	70,000/ 177,500
33 U.S.C. 1414b(d)(1) [1]	MPRSA	600	660	760	860
33 U.S.C. 1901 note (see 1409(a)(2)(A)).	CERTAIN ALASKAN CRUISE SHIP OPERATIONS (CACSO).	10,000/25,000	[2] 10,000/ 25,000	10,000/25,000	11,000/27,500
33 U.S.C. 1901 note (see 1409(a)(2)(B)).	CACSO	10,000/ 125,000	10,000/ 125,000	10,000/ 125,000	11,000/ 137,500
33 U.S.C. 1901 note (see 1409(b)(1)).	CACSO	25,000	25,000	25,000	27,500
42 U.S.C. 300g–3(b)	SAFE DRINKING WATER ACT (SDWA)	25,000	27,500	32,500	37,500
42 U.S.C. 300g–3(g)(3)(A).	SDWA	25,000	27,500	32,500	37,500
42 U.S.C. 300g–3(g)(3)(B).	SDWA	5,000/25,000	5,000/25,000	6,000/27,500	7,000/32,500
42 U.S.C. 300g–3(g)(3)(C).	SDWA	25,000	25,000	27,500	32,500
42 U.S.C. 300h–2(b)(1)	SDWA	25,000	27,500	32,500	37,500
42 U.S.C. 300h–2(c)(1)	SDWA	10,000/ 125,000	11,000/ 137,500	11,000/ 157,500	16,000/ 177,500
42 U.S.C. 300h–2(c)(2)	SDWA	5,000/125,000	5,500/137,500	6,500/157,500	7,500/177,500
42 U.S.C. 300h–3(c)	SDWA	5,000/10,000	5,500/11,000	6,500/11,000	7,500/16,000
42 U.S.C. 300i(b)	SDWA	15,000	15,000	16,500	16,500
42 U.S.C. 300i–1(c)	SDWA	20,000/50,000	[3] 22,000/ 55,000	100,000/ 1,000,000	110,000/ 1,100,000
42 U.S.C. 300j(e)(2)	SDWA	2,500	2,750	2,750	3,750
42 U.S.C. 300j–4(c)	SDWA	25,000	27,500	32,500	37,500
42 U.S.C. 300j–6(b)(2)	SDWA	25,000	25,000	27,500	32,500
42 U.S.C. 300j–23(d)	SDWA	5,000/50,000	5,500/55,000	6,500/65,000	7,500/70,000
42 U.S.C. 4852d(b)(5)	RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT OF 1992.	10,000	11,000	11,000	16,000
42 U.S.C. 4910(a)(2)	NOISE CONTROL ACT OF 1972	10,000	11,000	11,000	16,000
42 U.S.C. 6928(a)(3)	RESOURCE CONSERVATION AND RECOVERY ACT (RCRA).	25,000	27,500	32,500	37,500
42 U.S.C. 6928(c)	RCRA	25,000	27,500	32,500	37,500
42 U.S.C. 6928(g)	RCRA	25,000	27,500	32,500	37,500
42 U.S.C. 6928(h)(2)	RCRA	25,000	27,500	32,500	37,500
42 U.S.C. 6934(e)	RCRA	5,000	5,500	6,500	7,500
42 U.S.C. 6973(b)	RCRA	5,000	5,500	6,500	7,500
42 U.S.C. 6991e(a)(3)	RCRA	25,000	27,500	32,500	37,500
42 U.S.C. 6991e(d)(1)	RCRA	10,000	11,000	11,000	16,000
42 U.S.C. 6991e(d)(2)	RCRA	10,000	11,000	11,000	16,000
42 U.S.C. 7413(b)	CLEAN AIR ACT (CAA)	25,000	27,500	32,500	37,500
42 U.S.C. 7413(d)(1)	CAA	25,000/ 200,000	27,500/ 220,000	32,500/ 270,000	37,500/ 295,000
42 U.S.C. 7413(d)(3)	CAA	5,000	5,500	6,500	7,500
42 U.S.C. 7524(a)	CAA	2,500/25,000	2,750/27,500	2,750/32,500	3,750/37,500
42 U.S.C. 7524(c)(1)	CAA	200,000	220,000	270,000	295,000
42 U.S.C. 7545(d)(1)	CAA	25,000	27,500	32,500	37,500
42 U.S.C. 9604(e)(5)(B)	COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA).	25,000	27,500	32,500	37,500
42 U.S.C. 9606(b)(1)	CERCLA	25,000	27,500	32,500	37,500
42 U.S.C. 9609(a)(1)	CERCLA	25,000	27,500	32,500	37,500
42 U.S.C. 9609(b)	CERCLA	25,000/75,000	27,500/82,500	32,500/97,500	37,500/ 107,500
42 U.S.C. 9609(c)	CERCLA	25,000/75,000	27,500/82,500	32,500/97,500	37,500/ 107,500
42 U.S.C. 11045(a)	EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT (EPCRA).	25,000	27,500	32,500	37,500
42 U.S.C. 11045(b)	EPCRA	25,000/75,000	27,500/82,500	32,500/97,500	37,500/ 107,500
42 U.S.C. 11045(c)(1)	EPCRA	25,000	27,500	32,500	37,500
42 U.S.C. 11045(c)(2)	EPCRA	10,000	11,000	11,000	16,000
42 U.S.C. 11045(d)(1)	EPCRA	25,000	27,500	32,500	37,500
42 U.S.C. 14304(a)(1)	MERCURY-CONTAINING AND RECHARGEABLE BATTERY MANAGEMENT ACT (BATTERY ACT).	10,000	10,000	11,000	16,000

TABLE 1—OF SECTION 19.4 CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. code citation	Environmental statute	Statutory penalties, as enacted	Penalties effective after January 30, 1997 through March 15, 2004	Penalties effective after March 15, 2004 through January 12, 2009	Penalties effective after January 12, 2009
42 U.S.C. 14304(g)	BATTERY ACT	10,000	10,000	11,000	16,000

[1] Note that 33 U.S.C. 1414b(d)(1)(B) contains additional penalty escalation provisions that must be applied to the penalty amounts set forth in this Table 1. The amounts set forth in this Table reflect an inflation adjustment to the calendar year 1992 penalty amount expressed in section 104B(d)(1)(A), which is used to calculate the applicable penalty amount under MPRSA section 104B(d)(1)(B) for violations that occur in any subsequent calendar year.

[2] CACSO was passed on December 21, 2000 as part of Title XIV of the Consolidated Appropriations Act of 2001, Public Law 106–554, 33 U.S.C. 1901 note.

[3] The original statutory penalty amounts of 20,000 and 50,000 under section 1432(c) of the Safe Drinking Water Act, 42 U.S.C. 300i–1(c), were subsequently increased by Congress pursuant to section 403 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Public Law No. 107–188 (June 12, 2002), to 100,000 and 1,000,000, respectively. EPA did not adjust these new penalty amounts in its 2004 Civil Monetary Penalty Inflation Adjustment Rule (''2004 Rule''), 69 FR 7121 (February 13, 2004), because they had gone into effect less than two years prior to the 2004 Rule.

Dated: December 30, 2008.

Catherine R. McCabe,

Principal Deputy Assistant Administrator, Office of Enforcement and Compliance Assurance.

[FR Doc. E8–31452 Filed 1–6–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0528; FRL–8396–2]

Extract of Chenopodium ambrosioides near ambrosioides; Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of the Extract of *Chenopodium ambrosioides* near *ambrosioides* on all food commodities when applied/used as a biochemical insecticide/acaricide. AgraQuest, Inc. submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of Extract of *Chenopodium ambrosioides* near *ambrosioides* on all food commodities.

DATES: This regulation is effective January 7, 2009. Objections and requests for hearings must be received on or before March 9, 2009, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0528. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Chris Pfeifer, Biopesticides and Pollution Prevention Division (7511P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–0031; e-mail address: *pfeifer.chris@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing electronically available documents at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. You must file your objection or request a hearing on this regulation in

accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–0528 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before March 9, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit your copies, identified by docket ID number EPA–HQ–OPP–2008–0528, by one of the following methods.

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*. OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Background and Statutory Findings

In the **Federal Register** of July 31, 2008 (73 FR 44720) (FRL–8374–3), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 7F7299) by AgraQuest, Inc., 1540 Drew Avenue, Davis, CA, 95618. The petition requested that 40 CFR part 180 be amended by establishing an exemption from the requirement of a tolerance for residues of Extract of *Chenopodium ambrosioides* near *ambrosioides*. This notice included a summary of the petition prepared by the petitioner AgraQuest, Inc.. There were no substantive comments received in response to the notice of filing. However, three letters of support from prospective users expressed enthusiasm for the proposed new food uses.

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Pursuant to section 408(c)(2)(B) of FFDCA, in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in section 408(b)(2)(C) of FFDCA, which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .'' Additionally, section 408(b)(2)(D) of FFDCA requires that the Agency consider ''available information concerning the cumulative effects of a particular pesticide's residues and other substances that have a common mechanism of toxicity.''

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides. Second, EPA examines exposure to the pesticide through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings.

III. Toxicological Profile

Consistent with section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness, and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Extract of *Chenopodium ambrosioides* near *ambrosioides* is a blended extract derived from a flowering plant commonly known as American Wormseed. It is an amber liquid that is semi-volatile, and has a fruity, woodsy, aromatic smell. The extract is composed of many constituent ingredients, the properties of which have all been assessed previously in Agency reviews (Science Review in Support of the Registration of the active ingredient *Chenopodium ambrosioides* near *ambrosioides*, February 2008; Science Review and Tolerance Exemption Petition Review In Support of the Registration of Requiem™ 25EC containing Extract of *Chenopodium ambrosioides* near *ambrosioides* as its active ingredient, October 2008). It has had many historical medicinal uses, and was cited in the *U.S. Pharmacopoeia*. Most recently, the extract has been used as the active ingredient in a Federally registered biopesticide product intended for non-food uses as a contact insectidcide and acaracide on ornamentals. Extract of*Chenopodium ambrosioides* near *ambrosioides* has a ''non-toxic'' mode of action, which softens cuticles in target insects, resulting in a disruption of insect respiration. This rule establishes the exemption of a tolerance for Extract of *Chenopodium ambrosioides* near *ambrosioides* on all food commodities.

Extract of *Chenopodium ambrosioides* near *ambrosioides* contains three major terpene constituents—α-terpinene, p-cymene, and d-limonene—which occur naturally in fruits, vegetables, herbs, spices, and other foods and beverages, and are defined as marker compounds in the active ingredient. These three compounds are also permitted as food and fragrance additives in the U.S. and Europe. These three constituents have been fully characterized by EPA and have each been assessed for their uses in pesticides for food uses in the October 2008 risk assessment referenced above. Based on the information before the Agency, incidental exposures to these three compounds are without known toxicological incident for humans. The general public is exposed daily to low levels of these compounds via ingestion, dermal contact, inhalation through consumption of foods and beverages and dermal contact with cosmetics, in excess of any exposure expected to result from the pesticidal use of this extract. The per capita daily consumption of these terpene compounds as food additives alone amounts to 13.325 milligrams (mg) in the U.S. and 40.397 mg in Europe (WHO. Evaluation of Certain Food Additives. WHO Technical Report Series No. 928. Sixty-third Report of the Joint FAO/WHO Expert Committee on Food Additives. 2005), amounts far in excess of any potential dietary exposures resulting from exposures to residues from this pesticidal extract, as discussed below. α-Terpinene is found in the essential oils of a variety of plants including citrus, peppermint, thyme,

basil, and papaya. Per 21 CFR 172.515, it is permitted for direct addition to food for human consumption. d-Limonene is a major component of lemon oil, orange oil, and grapefruit oil, and is a minor component of other fruits, vegetables, meats, and spices. It is widely used as a flavor and fragrance and is generally recognized as safe (GRAS) by the Food and Drug Administation (FDA) as a food additive or flavoring, and as a fragrance additive (21 CFR 182.60). Limonene is a federally registered active ingredient in 15 pesticides and is exempt from the requirement of a tolerance per 40 CFR 180.539. Humans regularly consume p-Cymene through such foods as butter, carrots, nutmeg, orange juice, oregano, raspberries, lemon oil, and spices. p-Cymene is permitted by FDA for direct addition to food as a flavoring substance (21 CFR 172.515). For the reasons set forth below, EPA believes it reasonable to conclude that the terpene exposures identified above will either exceed or be comparable to exposures resulting from use of this extract as a pesticide. The balance of the constituents, while not expected to be active, are also regularly found in fruits, vegetables and plant extracts and have been assessed by EPA and determined not to be of toxicological concern when used in pesticides for food uses (Risk Assessments for Extract of *Chenopodium ambrosioides* near *ambrosioides* dated February 2008 and October 2008). Overall, a thorough analysis of the constituent compounds of Extract of *Chenopodium ambrosioides* near *ambrosioides* indicate a low toxicity profile and support this exemption from the requirement of a tolerance.

A low toxicity profile of the constituents, the fact that they have been assessed by the Agency already, and the lack of detectable residues for this contact insecticide support the Agency's determination to establish an exemption from the requirement of a tolerance. Three residue studies demonstrate that the rapid degradation of the extract leaves no opportunity for post-application exposure. A residue decline study on primrose demonstrated that when the extract is sprayed at 4X the proposed application rate, residues of the three major active ingredient components declined to non-detectable levels within 10 minutes (MRID 47209101). A second study on tomatoes involving four applications of the extract within a 24–hour period found no detectable residues on any samples collected immediately following the final application (MRID 46858903). A third residue study on mustard greens involving three applications at twice the application rate found no detectable residues within the hour after the third application (MRID 47548301). Essentially, data demonstrate that by the time Extract of *Chenopodium ambrosioides* near *ambrosioides* has dried on the plant there is no detectable residual product. Accordingly, the dietary risk assessment of Extract of *Chenopodium ambrosioides* near *ambrosioides* suggests that the lack of exposure to residues of the extract obviate any dietary hazard, and support an exemption from the requirement of a tolerance.

Summaries of the toxicological information submitted in support of this exemption from the requirement of a tolerance follow:

1. *Acute toxicity*. Acute toxicity studies submitted to support the initial registration of the manufacturing use product containing the active ingredient Extract of *Chenopodium ambrosioides* near *ambrosioides* confirm a low toxicity profile, and support the finding that this active ingredient poses no significant human health risk with regard to food uses. A summary of the acute toxicity studies follows:

i. The acute oral LD_{50}s in rats were 2,000--5,000 mg/Kg and confirm negligible toxicity through the oral route.

ii. The acute dermal LD_{50} in rats for was greater than 5,000 mg/kg. These data substantiate the active ingredient's relative dermal non-toxicity to both occupational users and the general public.

iii. The acute inhalation LC_{50} is greater than 2.03 mg/L in rats, and shows no significant inhalation toxicity.

iv. A skin irritation study on rabbits indicated that the extract was mildly irritating to the skin. Overall, the data further support the finding of negligible dermal toxicity presented in the acute dermal toxicity study.

v. The extract has been classified as a dermal sensitizer; however, no exposures (prolonged or otherwise) are expected due to the rapid degradation of the extract.

The rapid degradation of the extract is expected to preclude any route of exposure, obviating all potential acute toxic effects. Nonetheless, the acute toxicity data suggest that even in the event of any dietary exposure that the dietary risk would be considered negligible.

2. *Genotoxicity*. Three genotoxicity studies (a bacterial reverse mutation assay, an *in vitro* mammalian chromosome aberration test, and an unscheduled DNA repair assay) were performed on the active ingredient Extract of *Chenopodium ambrosioides* near *ambrosioides*. The reverse mutation assay (MRID 46456301) showed that the extract was not mutagenic to bacterial strains TA98, TA100, TA1535, TA1537, and *E. coli* strain WP2 uvrAW. The *in vitro* mammalian chromosome aberration test (MRID 46396214) demonstrated that the extract produced no statistically significant increases in chromosome/chromatid aberrations in human lymphocytes with, or without, metabolic activation. The third study, a DNA repair assay (MRID 46396215) was also negative because the extract did not cause unscheduled DNA repair in cultured rat hepatocytes. The mutagenicity studies are sufficient to confirm that there are no expected dietary, occupational, or non-occupational risks of mutagenicity with regard to new food uses.

3. *Subchronic toxicity*. As a contact insecticide, residues of the Extract of *Chenopodium ambrosioides* near *ambrosioides* in or on all food commodities are not expected to result in any repeated and/or long-term exposure by the oral, dermal or inhalation routes. As a result, no subchronic studies are required to establish the food use pattern of this extract or to exempt it from the requirement of a tolerance. Waiver requests for the subchronic toxicity studies were approved in large part on the basis of three residue studies, which confirm the extract's rapid degradation. A residue decline study on primrose (MRID 4729101) demonstrated that when the end use product (EP) containing the extract was applied at four times the application rate, the marker components were not detectable 10 minutes after application. In a second study, the EP was applied four times at twice the application rate on tomatoes (MRID 46858903). Residues of the marker components were below the limit of quantitation (LOQ) of 0.01 mg/kg when plant samples were collected and checked at 0, 3, 6, and 24 hour intervals. In another study on mustard greens (MRID 47548301), the EP was applied three times at twice the application rate to mustard greens, residues of the marker components had dissipated to below the LOQ of 0.05 ppm at 1–4 hours after the last application. With regard to subchronic dietary exposure, potential exposure to the residues is unlikely to occur because of the rapid degradation of the extract. Nonetheless, it is noted that the constituent components of the extract are already a regularized part of the

human diet, and are not known to pose a hazard at the levels approximated immediately after application (WHO, 2005). With regard to subchronic dermal or inhalation exposure, the rapid degradation of the extract, likewise, limits the potential for exposure.

4. *Developmental toxicity*. The Agency accepted information from the open scientific literature to address data requirements for developmental and reproductive toxicity (Araujo, I.B., et al. 1996. Study of the Embryofoetotoxicity of α-Terpinene in the Rat. Food and Chemical Toxicology 34:477-482.; Cornell University. Medicinal Plants Website. Medicinal Plants for Livestock, Beneficial or Toxic? .*http://www.ansci.cornell.edu/plants/medicinal/plants.html*. 2008.; HPV. The Flavor and Fragrance High Production Volume Consortia. The Terpene Consortium: Test Plan for Aromatic Terpene Hydrocarbons. 2002.). The residue data referenced in the ''subchronic toxicity'' section above demonstrate that there should be no exposures that might precipitate any developmental toxicity. All information submitted indicate that when used as proposed, Extract of *Chenopodium ambrosioides* near*ambrosioides* will not result in detectable residues. Dietary exposure would not be expected to pose any quantifiable risk, due to a lack of residues of toxicological concern. Moreover, information submitted on the constituent components of the Extract of *Chenopodium ambrosioides* near *ambrosioides* indicates that the extract is not a developmental or reproductive toxicant. The Agency has risk assessments for all the marker components in this extract on file. Those assessments demonstrate that none of the marker constituents in the extract are developmental or reproductive toxicants. Studies submitted on the constituent components of the extract also allow EPA to establish worst-case scenario toxicological endpoints - a conservative maternal NOAEL of 60 mg/kg-day and a developmental NOAEL of 30 mg/kg-day. Agency exposure assessments show all potential occupational exposures to be substantially below the worst-case endpoints presented here (BRAD on Extract of *Chenopodium ambrosioides* near *ambrosioides*). Altogether, significant exposure to female humans is not expected to occur at a level of toxicological concern based on the overall low toxicity profile of the extract, the lack of exposure due to rapid degradation of the extract, and the ubiquitous presence of the main components of the extract in the environment, food and cosmetics, all without reported hazard. Accordingly, the information submitted to the Agency to demonstrates a clear lack of both dietary exposure and developmental toxicity and supports the Agency's conclusion that there is no risk of developmental toxicity associated with the new food uses.

5. *Immunotoxicity*. A waiver request was accepted for immunotoxicity for the following reasons:

i. The potential for any immunotoxic effect is precluded by the extract's rapid degradation.

ii. The constituent components in the extract are ubiquitous in nature; and our regular exposure to these compounds is without known immunotoxicological incident.

iii. There is a long history of intentional use of the constituent compounds in food, fragrance, and flavoring, all without known immunotoxicological incident.

iv. The toxicological profile in acute toxicological studies does not suggest any immunotoxicity.

All information points to the lack of dietary risk posed by the immunotoxicity of Extract of *Chenopodium ambrosioides* near *ambrosioides* residues, and supports the exemption from the requirement of a tolerance.

6. *Effects on endocrine systems*. There is no available evidence demonstrating that Extract of *Chenopodium ambrosioides* near *ambrosioides* is an endocrine disruptor in humans. As a result, the Agency is not requiring information on the endocrine effects of Extract of *Chenopodium ambrosioides* near *ambrosioides* at this time. However, the Endocrine Disruption Screening Program (EDSP) is still in the process of establishing a protocol; and the Agency reserves the right to require new information, should the program require it. Presently, based on the lack of exposure and the negligible toxicity profile of the extract, no adverse effects to the endocrine or immune systems are known or expected. Overall, the lack of evidence of endocrine disruption is consistent with Extract of *Chenopodium ambrosioides* near *ambrosioides*' low-toxicity profile, and supports this exemption from the requirement of a tolerance.

IV. Aggregate Exposures

In examining aggregate exposure, section 408 of FFDCA directs EPA to consider available information concerning exposures from the pesticide residue in food and all other non-occupational exposures, including drinking water from ground water or surface water and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses).

A. Dietary Exposure

Dietary exposure to the residues of the contact insecticide Extract of *Chenopodium ambrosioides* near *ambrosioides*, through food or water, is expected to be virtually non-existent.

1. *Food*. No dietary exposure to Extract of *Chenopodium ambrosioides* near *ambrosioides* residues is expected because the extract degrades soon after application. Residue decline studies on tomatoes, mustard greens and primrose confirm that applications of the extract do not result in detectable residues shortly after application. Accordingly, data demonstrate that dietary exposure will be precluded. But even if residues were found, they would not be cause for concern because Extract of *Chenopodium ambrosioides* near *ambrosioides* has been fully assesed and found not to be of toxicological concern. Humans regularly consume all the constituent components in the extract through consumption of fruits and vegetables. This regular dietary exposure has not resulted in any known incidents of toxic effect. Moreover, the three primary terpene constituents, comprising 70% of the active ingredient, have been approved by FDA for use in cosmetics and as food additives. Finally, information submitted on the acute toxicity, developmental toxicty, and genotoxicity of Extract of *Chenopodium ambrosioides* near *ambrosioides* confirm a very low toxicity profile. In sum, no dietary exposure is expected; but any potential dietary exposures would not be expected to pose any quantifiable risk, due to a lack of residues of toxicological concern.

2. *Drinking water exposure*. Exposure of humans to Extract of *Chenopodium ambrosioides* near *ambrosioides* in drinking water is unlikely because pesticidal applications are intended to be applied directly to terrestrial plants and because any residues would have significantly degraded in the advance of any rainfall event. Low application rates and rapid biodegradation in water (an aqueous half life of 36.11 hours) further reduce the potential for drinking water exposure. Drinking water exposure is not expected to pose any quantifiable risk due to a lack of residues of toxicological concern.

B. Other Non-Occupational Exposure

No new non-occupational exposure is expected to result from the new agricultural uses of Extract of

Chenopodium ambrosioides near *ambrosioides*. The active ingredient is applied directly to food commodities and degrades extremely rapidly. However, the Agency notes that no health risks are expected from any pesticidal exposure to this active ingredient in any event. An April 2008 risk assessment of Extract of *Chenopodium ambrosioides* near *ambrosioides* makes clear that even regular occupational exposures that are associated with this active ingredient pose negligible risks.

1. *Dermal exposure*. No new non-occupational dermal exposures are expected to result from the new agricultural uses of Extract of *Chenopodium ambrosioides* near *ambrosioides*. Any new dermal exposure associated with this new agricultural use pattern is expected to be occupational in nature.

2. *Inhalation exposure*. No new non-occupational inhalation exposures are expected to result from the new agricultural uses of Extract of *Chenopodium ambrosioides* near *ambrosioides*. Any new inhalation exposure associated with this new agricultural use pattern is expected to be occupational in nature.

V. Cumulative Effects

Pursuant to FFDCA section 408(b)(2)(D)(v), EPA has considered available information concerning the cumulative effects of Extract of *Chenopodium ambrosioides* near *ambrosioides* residues and other substances that have a common mechanism of toxicity. These considerations include the cumulative effects on infants and children of Extract of *Chenopodium ambrosioides* near *ambrosioides* residues and other substances with a common mechanism of toxicity. Because no exposure to residues are expected with this application, and the components of the extract have a long history of use without incident, the Agency concludes that there are no cumulative effects arising from Extract of *Chenopodium ambrosioides* near *ambrosioides* residues in or on food commodities.

VI. Determination of Safety for U.S. Population, Infants and Children

Health risks to humans, including infants and children, are considered negligible with regard to the pesticidal use of Extract of *Chenopodium ambrosioides* near *ambrosioides*. Acute toxicity studies indicate that Extract of *Chenopodium ambrosioides* near *ambrosioides* has negligible toxicity. Notably, the constituent ingredients of the extract are ubiquitous in nature and present in a multitude of fruits and vegetables; and to date, there is no history of toxicological incident involving their consumption. Indeed, the marker constituents of the extract are approved as direct food additives by the FDA. Most importantly however, no exposure to the residues of Extract of *Chenopodium ambrosioides* near *ambrosioides* are expected. Pesticidal applications are applied directly to commercial crops; and data confirm that detectable residues do not persist beyond the time for the active ingredient to dry on to foliar surfaces. Accordingly, no dietary exposure is expected. As such, the Agency has determined that this food use of Extract of *Chenopodium ambrosioides* near *ambrosioides* poses no foreseeable risks to human health or the environment. There is a reasonable certainty of no harm to the general U.S. population, including infants and children, from exposure to this active ingredient.

VII. Other Considerations

A. Endocrine Disruptors

There is no evidence, at this time, that suggests the Extract of *Chenopodium ambrosiodes* near *ambrosioides* will compromise the immune or endocrine systems, or that it functions in a manner similar to any known hormone, or that it acts as an endocrine disruptor.

B. Analytical Method

Through this action, the Agency proposes an exemption from the requirement of a tolerance of Extract of *Chenopodium ambrosiodes* near *ambrosioides* when used on food commodities, without any numerical limitations for residues. EPA has determined that residues resulting from the pesticidal uses of Extract of *Chenopodium ambrosiodes* near ambrosioides are unlikely, and that there are no significant toxicity concerns in the event that residues of the active ingredient were somehow present. As a result, the Agency has concluded that an analytical method is not required for enforcement purposes for this proposed use of Extract of *Chenopodium ambrosiodes* near *ambrosioides*.

C. Codex Maximum Residue Level

There are no codex maximum residue levels established for residues of Extract of *Chenopodium ambrosioides* near *ambrosioides*.

VIII. Conclusions

Based on the information submitted, and other information available to the Agency, EPA is establishing an exemption from the tolerance requirements pursuant to FFDCA section 408(c) for residues of Extract of *Chenopodium ambrosioides* near *ambrosioides* in or on all agricultural commodities.

IX. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq., nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR

67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

X. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 12, 2008.

Debra Edwards,

Director, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.1287 is added to subpart D to read as follows:

§ 180.1287 Extract of Chenopodium ambrosioides near ambrosioides; exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for the residues of Extract of *Chenopodium ambrosioides* near *ambrosioides* when used as an insecticide/acaricide on all food commodities.

[FR Doc. E8–31408 Filed 1–6–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0823; FRL–8392–3]

Multiple Chemicals; Extension of Tolerances for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation extends time-limited tolerances for the pesticides listed in Unit II. of the **SUPPLEMENTARY INFORMATION**. These actions are in response to EPA's granting of emergency exemptions under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing use of these pesticides. Section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA) requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA.

DATES: This regulation is effective January 7, 2009. Objections and requests for hearings must be received on or before March 9, 2009, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**.

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0823. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: See the table in this unit for the name of a specific contact person. The following information applies to all contact persons: Emergency Response Team, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460–0001.

Pesticide/CFR Citation	Contact Person
Formetanate hydrochloride 180.276	Andrew Ertman *ertman.andrew@epa.gov* 703–308–9367
Maneb 180.110	Libby Pemberton *pemberton.libby@epa.gov* 703–308–9364
Myclobutanil 180.443	Stacey Groce *groce.stacey@epa.gov* 703–30–2505
Thiophanate methyl 180.371	Andrea Conrath *conrath.andrea@epa.gov* 703–308–9356

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions discussed above. If you have any questions regarding the applicability of this action to a particular entity, consult

the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing an electronic copy of this **Federal Register** document through the electronic docket at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, as amended by FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–0823 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before March 9, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit your copies, identified by docket ID number EPA–HQ–OPP–2008–0823, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Background and Statutory Findings

EPA published final rules in the **Federal Register** for each pesticide listed. The initial issuance of these final rules announced that EPA, on its own initiative, under section 408 of FFDCA, 21 U.S.C. 346a, as amended by the Food Quality Protection Act of 1996 (FQPA) (Public Law 104–170), was establishing time-limited tolerances.

EPA established the tolerances because section 408(l)(6) of FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under FIFRA section 18. Such tolerances can be established without providing notice or time for public comment.

EPA received requests to extend the use of these chemicals for this year's growing season. After having reviewed these submissions, EPA concurs that emergency conditions exist. EPA assessed the potential risks presented by residues for each chemical. In doing so, EPA considered the safety standard in section 408(b)(2) of FFDCA, and decided that the necessary tolerance under section 408(l)(6) of FFDCA would be consistent with the safety standard and with FIRA section 18.

The data and other relevant material have been evaluated and discussed in the final rule originally published to support these uses. Based on that data and information considered, the Agency reaffirms that extension of these time-limited tolerances will continue to meet the requirements of section 408(l)(6) of FFDCA. Therefore, the time-limited tolerances are extended until the date listed. EPA will publish a document in the **Federal Register** to remove the revoked tolerances from the Code of Federal Regulations (CFR). Although these tolerances will expire and are revoked on the date listed, under section 408(l)(5) of FFDCA, residues of the pesticide not in excess of the amounts specified in the tolerance remaining in or on the commodity after that date will not be unlawful, provided the residue is present as a result of an application or use of a pesticide at a time and in a manner that was lawful under FIFRA, the tolerance was in place at the time of the application, and the residue does not exceed the level that was authorized by the tolerance. EPA will take action to revoke these tolerances earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

Tolerances for the use of the following pesticide chemicals on specific commodities are being extended:

1. *Formetanate hydrochloride*. EPA has authorized under FIFRA section 18 the use of formetanate hydrochloride on bulb onions for control of thrips in Colorado, Idaho, Michigan, New York, Ohio, Oregon, Washington, and Wisconsin. This regulation extends a time-limited tolerance for residues of the insecticide formetanate hydrochloride, (m-[[(dimethylamino) methylene]amino]phenyl methylcarbamate hydrochloride, in or on onion, dry bulb at 0.02 parts per million (ppm) for an additional 1–year period. This tolerance will expire and is revoked on December 31, 2009. A time-limited tolerance was originally published in the **Federal Register** of February 20, 2008 (73 FR 9226) (FRL–8343–6).

2. *Maneb*. EPA has authorized under FIFRA section 18 the use of Maneb on walnuts for control of bacterial blight in California. This regulation extends a time-limited tolerance for combined residues of the fungicide maneb (manganous ethylenebisdithiocarbamate) calculated as zinc ethylenebisdithiocarbamate, and its metabolite ethylenethiourea in or on walnuts at 0.05 ppm for an additional 1–year period. This tolerance will expire and is revoked on December 31, 2009. A time-limited tolerance was originally published in the **Federal Register** of March 17, 1999 (64 FR 13097) (FRL–6067–9). The time-limited tolerance exemption was last extended on December 21, 2005 at 70 FR 75734.

3. *Myclobutanil*. EPA has authorized under FIFRA section 18 the use of myclobutanil on legume vegetables for control of soybean rust in various States. This regulation extends time-limited tolerances for combined residues of the fungicide, myclobutanil, alpha-butyl-alpha-(4-chlorophenyl)-1H-1,2,4-triazole-1-propanenitrile, and its alcohol metabolite, alpha-(3-hydroxybutyl)-alpha-(4-chlorophenyl)-1H-1,2,4-triazole-1-propanenitrile (free and bound), in or on vegetable, foliage of legume, group 07, and vegetable, legume, group 06 at 1.0 ppm for an additional 6–month period. These tolerances will expire and are revoked on December 31, 2009. Time-limited tolerances were originally published in the **Federal Register** of June 28, 2006 (71 FR 36687) (FRL–8068–2).

4. *Thiophanate methyl*. EPA has authorized under FIFRA section 18 the use of Thiophanate methyl on citrus for control of post-bloom fruit drop in Florida and Texas. This regulation extends a time-limited tolerance for combined residues of the fungicide thiophanate methyl and its metabolite, methyl 2-benzimidazoyl carbamate (MBC) in or on citrus at 0.5 ppm for an additional 6–month period. This tolerance will expire and is revoked on December 31, 2009. A time-limited tolerance was originally published in the **Federal Register** of September 12, 2002 (67 FR 57748) (FRL–7196–5). The time-limited tolerance exemption was last extended on December 21, 2005 at 70 FR 75734.

5. *Thiophanate methyl*. EPA has authorized under FIFRA section 18 the use of thiophanate methyl on fruiting vegetables, including tomato for control of white mold in Florida, Virginia, and New Jersey. This regulation extends a time-limited tolerance for combined residues of the fungicide thiophanate methyl and its metabolite, methyl 2-benzimidazoyl carbamate (MBC) in or on the fruiting vegetable crop group at 0.5 ppm for an additional 1–year period. This tolerance will expire and is revoked on December 31, 2009. A time-limited tolerance was originally published in the **Federal Register** of July 23, 2003 (68 FR 43465) (FRL–7317–5). The time-limited tolerance exemption was last extended on December 21, 2005 at 70 FR 75734.

6. *Thiophanate methyl*. EPA has authorized under FIFRA section 18 the use of thiophanate methyl on mushroom spawn and growing substrate for control of green mold in California, Delaware, Maryland, Oregon, and Pennsylvania. This regulation extends a time-limited tolerance for combined residues of the fungicide thiophanate methyl and its metabolite, methyl 2-benzimidazoyl carbamate (MBC) in or on mushroom at 0.01 ppm for an additional 1–year period. This tolerance will expire and is revoked on December 31, 2009. A time-limited tolerance was originally published in the **Federal Register** of February 5, 2003 (68 FR 5847) (FRL–7285–9). The time-limited tolerance exemption was last extended on December 21, 2005 at 70 FR 75734.

III. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000) do not apply to this rule. In addition, This rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

IV. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 23, 2008.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

§ 180.110 [Amended]

■ 2. In § 180.110, in the table to paragraph (b), amend the entry for Walnut by revising the expiration date 12/31/08 to read 12/31/09.

§ 180.276 [Amended]

■ 3. In § 180.276, in the table to paragraph (b), amend the entry for Onion, dry bulb by revising the expiration date 12/31/08 to read 12/31/09.

§ 180.371 [Amended]

■ 4. In § 180.371, in the table to paragraph (b), amend the entry for Citrus by revising the expiration date 6/30/09 to read 12/31/09 and the entries for Mushroom; and Vegetable, fruiting, group 8 by revising the expiration dates 12/31/08 to read 12/31/09.

§ 180.443 [Amended]

■ 5. In § 180.443, in the table to paragraph (b), amend the entries for Vegetable, foliage of legume, group 07 and Vegetable, legume, group 06 by revising the expiration dates 6/30/09 to read 12/31/09.

[FR Doc. E9–31336 Filed 1–6–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2007–0438; FRL–8396–4]

Novaluron; Pesticide Tolerances Technical Amendment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; technical amendment.

SUMMARY: EPA issued a final rule in the **Federal Register** of December 10, 2008, concerning the establishment of tolerance residues of novaluron in or on sugarcane, cane and tomato. This document is being issued to correct an amendment to the section as published in that document.

DATES: This final rule is effective January 7, 2009.

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0438. All documents in the docket are listed in the docket index available in *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Susan Stanton, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington DC 20460–0001; telephone number: (703) 305–5218; e-mail address: *stanton.susan @epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

The Agency included in the final rule a list of those who may be potentially affected by this action. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under the **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document and Other Related Information?

In addition to accessing electronically available documents at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*.

II. What Does this Correction Do?

FR Doc. E8–29117 published in the **Federal Register** of December 10, 2008 (73 FR 74978) (FRL–8391–5) is corrected to amend §180.598 on page 74982. The amendment to paragraph (b) should have removed the text. This document is being published to correct that oversight.

III. Why is this Correction Issued as a Final Rule?

Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), provides that, when an Agency for good cause finds that notice and public procedure are impracticable, unnecessary or contrary to the public interest, the Agency may issue a final rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's technical correction final without prior proposal and opportunity for comment, because the use of notice and comment procedures is unnecessary to effectuate this correction. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(B).

IV. Do Any of the Statutory and Executive Order Reviews Apply to this Action?

No. This action amends the section for a previously published final rule and does not impose any new requirements. EPA's compliance with the statutes and Executive Orders for the underlying rule is discussed in Unit. VI. of the December 10, 2008 final rule (73 FR 74978).

V. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 23, 2008.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR part 180 is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

§ 180.598 [Amended]

■ 2. Section 180.598 is amended by removing the text of paragraph (b) and reserving the heading.

[FR Doc. E8–31288 Filed 1–6–09; 8:45 am]

BILLING CODE 6560–50–S

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 3500

[LLWO32000.L13300000.PO0000.24–1A]

RIN 1004–AD91

Leasing of Solid Minerals Other Than Coal and Oil Shale

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Land Management (BLM) is amending its regulations in 43 CFR part 3500 for leasing of solid minerals other than coal and oil shale to distinguish fringe acreage lease requirements from lease modification requirements, and to describe acceptable justifications for a lease modification. The final rule also identifies changes in the associated procedural requirements and updates the filing fees. The final changes are based on statutory authorities, which authorize the BLM to issue regulations for leasing of minerals and to charge for administrative processing costs, and on policy guidance from the Office of Management and Budget (OMB) and the Department of the Interior (DOI) requiring the BLM to charge these fees.

DATES: *Effective date:* February 6, 2009.

ADDRESSES: Inquiries or suggestions should be delivered to Director (320), Bureau of Land Management, Room 501LS, 1849 C Street, NW., Washington, DC 20240, ATTN: 1004–AD91.

FOR FURTHER INFORMATION CONTACT: George Brown, Geologist, Solid Minerals Division (WO–320), Bureau of Land Management, Mail Stop-501LS, 1849 ''C'' Street, NW., Washington, DC 20240; or by telephone at (202) 452–7765. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8330, 24 hours a day, seven days a week, to leave a message or question with Mr. Brown. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION:

I. Background

On June 24, 2008 (73 FR 35609), the BLM published a proposed rule to amend 43 CFR part 3500, Leasing of Solid Minerals other than Coal and Oil Shale. The comment period ended on August 25, 2008. The BLM received one public comment, which wholeheartedly supported the proposed rule. We therefore publish today's final rule with no changes from the proposed rule.

The comment supported the proposed rule as necessary in order to promote maximum recovery of the minerals being leased. Without the revisions proposed in the rule, the comment continued, the BLM would be precluded from granting lease modifications when the acreage proposed to be added does not contain an extension of the mineral deposit. The comment stated that the experience of the members of the National Mining Association confirms that the current regulations can constrain optimal development and recovery.

As explained in the proposed rule, the BLM proposes initial lease boundaries that conform as nearly as possible to the orientation of known mineral deposits. However, progress in development of the deposit may indicate that a lease boundary may need refinement. For example, additional exploration by the lessee may identify extensions of the deposit onto adjoining land. Or new engineering information may determine that lease boundaries are not situated for optimal development and recovery of the mineral deposit within the lease. Thus, the BLM uses lease modifications to adjust lease boundaries and make corrections to accommodate new information. These changes are infrequent and typically involve relatively small areas.

Current regulations treat fringe acreage leases and lease modifications in the same way. In both cases, there must be a mineral deposit under the additional acreage to be added to the primary leasehold. In some cases, this required placing overburden onto lands containing mineral deposits, which interfered with maximum recovery of the minerals and shortened the operating life of some mines. It is appropriate that a fringe acreage lease, as a new lease, should be required to show the presence of a mineral deposit within the final lease boundaries. By contrast, since a modification is an adjustment to an existing lease that already contains a known mineral deposit, the requirement in the existing regulations for the presence of a mineral deposit in the modification area should not be applicable to adjustment of the existing lease boundary. Therefore, the final rule amends this provision with regard to lease modifications.

The final rule also provides more detailed information in the cross-reference in section 3510.12(b) to the cost recovery fees listed in section 3000.12 of title 43 of the CFR.

II. Discussion of Final Rule

The BLM is amending the regulation that requires that the acreage proposed to be added to an existing lease in a lease modification application must contain an extension of the mineral deposit. The amendment acknowledges that an existing lease already contains a known deposit, and provides for modification where the configuration of the lease boundary has been found to be inadequate for recovery of the previously leased mineral deposit. Under circumstances where there is no known deposit of the same mineral on the additional acreage, the final rule requires that the acreage to be added is necessary to achieve recovery of the mineral deposit on the pre-existing Federal lease and, had the acreage been included in the Federal lease at the time of the Federal lease's issuance, such inclusion would have produced a reasonably compact lease as required by the Mineral Leasing Act of February 25, 1920, as amended. The final rule recognizes that, since the additional acreage could have been included at the time of lease issuance even though it did not contain a known mineral deposit, it may now be included as a modification of the pre-existing lease. The final rule allows modification of lease boundaries for better accommodation of development based on new information on the location and orientation of deposits and extraction areas, providing potential cost savings to lessees and increased returns to the United States from maximum recovery of leased mineral deposits. This is a minor regulatory change that applies in limited circumstances. The BLM consulted with the Forest Service in the development of the proposed rule.

The principal reason for this amendment is to facilitate the modification of a lease for the following purposes:

(1) To recognize new information about the extent of the deposit to avoid bypassing reserves that could not be independently developed;

(2) To provide space for placement of overburden and other waste rock materials to facilitate maximum recovery of the mineral deposit; and/or

(3) To provide space for other facilities needed to recover the deposit, including ore stockpiles, topsoil stockpiles, haul and/or access roads, and support facilities such as warehouse and storage areas, shops, fuel and lubricant storage, equipment staging areas, electrical substations, repair shops, and restrooms.

All leases necessarily include some nonmineral acreage. Lease boundaries are based on the location of deposits that may not be fully identified at the time of lease issuance. Items (2) and (3) above already take place on existing leases but can be constrained because the lease boundaries may not be optimally situated with respect to the deposits to provide space for these activities. For example, due to the space limitations caused by orientation of the deposit relative to the lease boundary, temporary stockpiling of ore or overburden on the surface over an unmined portion of a deposit may be necessary, interfering with mining efficiency and increasing costs. Such stockpiling blocks access to the deposit, reduces recovery, and requires handling and hauling the stockpile multiple times as the deposit is mined. Readjustment of the lease boundary for better conformity with the deposit orientation will allow better utilization of the lease acreage for the overall mine operation.

Subpart 3516 provides for use permits for ancillary operations for phosphate leases (up to 80 acres) and sodium leases (up to 40 acres). However, use permits are not appropriate to meet the needs addressed by this final rule, for several reasons. Lease boundary readjustment provides for more efficient utilization of leased acreage and more space in the area of the greatest need immediately adjacent to the operations. Readjustment will provide more space

for operations in a compact configuration than a use permit by making more effective use of the acres that are leased and minimizing the additional acres needed. Use permits, on the other hand, may not provide enough acreage for all lease operations. Also, BLM use permit provisions do not apply to national forest lands.

III. Procedural Matters

1. Regulatory Planning and Review (E.O. 12866)

This document is not a significant rule and the Office of Management and Budget has not formally reviewed this rule under Executive Order (E.O.) 12866. We have made the assessments required by E.O. 12866 and the results appear below.

- The rule will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities. Mining companies rarely seek lease modifications. For the fifteen-year period from FY1992 through FY2007, BLM processed 18 lease modifications for active leases. This regulation change is not expected to result in a substantial increase in the number of modifications. Although the BLM expects few modifications, the likely economic impacts from an individual lease modification can be illustrated in the following example. In one recent lease modification, one company employed about 210 workers with annual wages of about $18.7 million. The modification extended the mine's life by 2 to 3 years, thereby extending the wage earnings for those 210 workers, and producing an additional $4 to 6 million in royalties for the Federal Government.
- The rule will not create a serious inconsistency with an action taken or planned by another agency. It will be consistent with the current practices of the BLM and the Forest Service for operation on a lease, which provide for consultation between the agencies before the BLM authorizes a lease modification, and will extend those practices to the additional lands in modified leases. It will not change the relationships of the BLM to other agencies and their actions. The final rule will allow a lease modification to increase the size, or change the shape and orientation of the lease, or both, providing more acreage for lease operations. Procedures for review and approval of all lease operations, including mining and reclamation plans, development of mitigation measures, and the associated reviews under the National Environmental Policy Act, will remain the same. Potential activities on the leases will remain the same. The effect of this rule is merely to provide more acreage to perform those operations on existing leases.
- The rule will not materially affect entitlements, grants, loan programs, or the rights and obligations of their recipients. The rule does not address any of these programs.
- The rule will not raise novel legal or policy issues.

2. Regulatory Flexibility Act

We certify that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) Although a substantial number of lessees meet the criteria for small entities, as defined by the Small Business Administration (SBA), the final rule will only affect a small number of entities and the annual effect on the economy of the regulatory changes will be less than $100 million. When it is applied, the final rule will have a beneficial impact because it allows the lessee to develop the lease more fully, and do so with greater efficiency and potentially at lower cost. A threshold analysis was performed, which determined that a Regulatory Flexibility Analysis is not required. The threshold analysis is available at the address specified under **ADDRESSES**. A Small Entity Compliance Guide is not required.

For the purposes of this section a ''small entity'' is an individual, limited partnership, or small company, at ''arm's length'' from the control of any parent companies, with fewer than 500 employees. This definition accords with Small Business Administration regulations at 13 CFR 121.201.

3. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act.

- This rule will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities. As explained above, lease modifications constitute a small part of solid non-energy mineral leasing activity and most of those are accomplished under existing regulations. The final rule is only expected to involve boundary adjustments for a few leases, and the associated economic effects:
- Will be less than $100 million annually;
- Will not cause a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions; and
- Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.
- The rule will not materially affect entitlements, grants, loan programs, or the rights and obligations of their recipients. The rule does not address any of these programs.

4. Unfunded Mandates Reform Act

This rule will not impose an unfunded mandate on state, local, or tribal governments or the private sector of more than $100 million per year. The rule will not have a significant or unique effect on state, local, or tribal governments or the private sector. The provisions of this rule do not require anything of any non-federal governmental entity. The rule is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*).

5. Governmental Actions and Interference With Constitutionally Protected Property Rights (Takings) (E.O. 12630)

Under the criteria in E.O. 12630, this rule does not have takings implications. This rule does not substantially change BLM policy. Nothing in this rule has any effect on private property interests, and therefore nothing in the rule constitutes a taking. A takings implication assessment is not required.

6. Federalism (E.O. 13132)

Under the criteria in Executive Order 13132, this rule does not have significant Federalism effects to warrant the preparation of a Federalism assessment. This rule does not change the role of or responsibilities among Federal, state, and local governmental entities, nor does it relate to the structure and role of states or have direct, substantive, or significant effects on states.

7. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

(1) Does not unduly burden the judicial system;

(2) Meets the criteria of sections 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(3) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

8. Consultation With Indian Tribes (E.O. 13175)

Under the criteria in E.O. 13175, we have evaluated this rule and determined that it has no potential effects on federally recognized Indian tribes. Because this rule does not make significant substantive changes in the regulations and does not specifically involve Indian reservation lands, we believe that relations with Indians, Indian tribes, and tribal governments will be unaffected and no consultation is needed for this rule. Consultation will take place, as necessary before making any lease modifications to individual leases. Lands within Indian Reservations, except the Uintah and Ouray Indian Reservation, Hillcreek Extension, State of Utah, are closed to the operation of the Mineral Leasing Act. Under Public Law 440 (Hill Creek Extension), the boundaries of the Uintah-Ouray Reservation were extended to include the surface of some public domain lands, but those lands do not contain any known mineral resources or leasing operations that are subject to these regulations and are unaffected by this change.

9. Paperwork Reduction Act

The BLM has determined that this final rule does not contain any new information collection requirements that the Office of Management and Budget (OMB) must approve under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The OMB has approved the information collection requirements in the regulations under OMB control number 1004–0073, which expires March 31, 2010.

10. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C), is not required.

The BLM has determined that any environmental effects that this final rule may have are too broad, speculative, or conjectural to lend themselves to meaningful analysis and any actions authorized by the rule will be subject to the NEPA process on a case-by-case basis. See 516 DM2, Appendix I, Item 1.10. In limited circumstances, this regulation will provide a limited amount of acreage within the lease boundary for operations to take place. The factual situation at each lease area is different. Specific proposals for modifications will be reviewed under NEPA and evaluated to identify the potential impacts associated with the final modifications and any appropriate mitigation, and the decisions about what operations will be allowed will be made on the basis of those analyses.

Therefore, the final rule is categorically excluded from environmental review under Section 102(2)(C) of the National Environmental Policy Act, pursuant to 516 Departmental Manual (DM) 2.3A and 516 DM 2, Appendix I, Item 1.10, and does not meet any of the 10 criteria for exceptions to categorical exclusion listed in 516 DM 2, Appendix 2. Pursuant to Council on Environmental Quality regulations (40 CFR 1508.4) and the environmental policies and procedures of the Department of the Interior, the term ''categorical exclusion'' means a category of actions that do not individually or cumulatively have a significant effect on the human environment and that have been found to have no such effect in procedures adopted by a Federal agency and for which neither an environmental assessment (EA) nor an environmental impact statement (EIS) is required.

Because the final promulgation of this rule will not itself approve any lease modifications, it will have no significant impacts on the environment and will not have a significant impact on any of the following critical elements of the human environment as defined in Appendix 5 of the BLM National Environmental Policy Act Handbook (H–1790–1): Air quality, areas of critical environmental concern, cultural resources, Native American religious concerns, threatened or endangered species, hazardous or solid waste, water quality, prime and unique farmlands, wetlands, riparian zones, wild and scenic rivers, environmental justice, and wilderness. The lease modifications that are authorized will be analyzed in EAs or EISs, and, if approved, they will incorporate site specific mitigation measures in both the modification approval and the mining/reclamation plan. This final rule does not change this, but makes it clear that, in certain circumstances, proponents of lease modifications do not bear the burden of showing that the land contains deposits of the minerals subject to the lease.

11. Information Quality Act

In developing this rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Section 515 of Pub. L. 106–554).

12. Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required. It will not have an adverse effect on energy supplies. The final rule will reduce energy requirements somewhat by facilitating efforts by lessees to keep operations compact. Thus, transportation required for materials within the mining operation may be reduced, given that operations will be conducted on adjacently located properties. Accordingly, we anticipate that this may reduce fuel consumption from haulage during operations. By facilitating maximum recovery of mineral deposits from leases, the final rule will extend mine life, allowing the existing infrastructure to be used for a longer time. Postponing development of the new infrastructure required for new mines will also reduce overall energy requirements.

13. Facilitation of Cooperative Conservation (E.O. 13352)

In accordance with Executive Order 13352, the BLM has determined that this final rule:

- Does not impede facilitating cooperative conservation;
- Takes appropriate account of and considers the interests of persons with ownership or other legally recognized interests in land or other natural resources;
- Properly accommodates local participation in the Federal decision-making process; and
- Provides that the programs, projects, and activities are consistent with protecting public health and safety.

Author

The principal author of this rule is George Brown, Geologist, Division of Solid Minerals, assisted by Ted Hudson, Acting Chief, Division of Regulatory Affairs, Washington Office, BLM.

List of Subjects in 43 CFR Part 3500

Government contracts, Intergovernmental relations, Mineral royalties, Mines, Public lands-mineral resources, Reporting and recordkeeping requirements, Surety bonds.

Dated: December 24, 2008.

C. Stephen Allred,

Assistant Secretary, Land and Minerals Management.

■ Accordingly, for the reasons stated in the preamble and under the authorities stated below, the BLM amends 43 CFR part 3500 as set forth below.

PART 3500—LEASING OF SOLID MINERALS OTHER THAN COAL AND OIL SHALE

■ 1. The authority citation for part 3500 continues to read as follows:

Authority: 5 U.S.C. 552; 30 U.S.C. 189 and 192c; 43 U.S.C. 1733 and 1740; and sec. 402, Reorganization Plan No. 3 of 1946 (5 U.S.C. Appendix).

Subpart 3501—Leasing of Solid Minerals Other Than Coal and Oil Shale—General

■ 2. Amend § 3501.10 by revising paragraph (f) to read as follows:

§ 3501.10 What types of mineral use authorizations can I get under these rules?

* * * * *

(f) ''Lease modifications'' add adjacent acreage to a Federal lease. The acreage to be added:

(1) Contains known deposits of the same mineral that can be mined only as part of the mining operation on the original Federal lease; or

(2) Has the following characteristics—

(i) Does not contain known deposits of the same mineral;

(ii) Will be used for surface activities that are necessary in furtherance of recovery of the mineral deposit on the original Federal lease; and

(iii) Had the acreage been included in the original Federal lease at the time of the Federal lease's issuance, the original Federal lease would have been reasonably compact.

* * * * *

■ 3. Amend § 3510.12 by revising paragraphs (b) and (c), and by adding paragraph (d), to read as follows:

§ 3510.12 What must I do to obtain a lease modification or fringe acreage lease?

* * * * *

(b) Include a non-refundable filing fee as provided in § 3000.12, Table 1, of this chapter (the fee may be found under ''Leasing of Solid Minerals Other Than Coal and Oil Shale (Part 3500)''). You must also make an advance rental payment in accordance with the rental rate for the mineral commodity you are seeking. If you want to modify an existing lease, the BLM will base the rental payment on the rate in effect for the lease being modified in accordance with § 3504.15.

(c) Your fringe acreage lease application must:

(1) Show the serial number of the lease if the lands specified in your application adjoin an existing Federal lease;

(2) Contain a complete and accurate description of the lands desired;

(3) Show that the mineral deposit specified in your application extends from your adjoining lease or from adjoining private lands you own or control; and

(4) Include proof that you own or control the mineral deposit in the adjoining lands if they are not under a Federal lease.

(d) Your lease modification application must:

(1) Show the serial number of your Federal lease that you seek to modify;

(2) Contain a complete and accurate description of the lands desired that adjoin the Federal lease you seek to modify; and

(3) Show that—

(i) The adjoining acreage to be added contains known deposits of the same mineral deposit that can be mined only as part of the mining operations on the original Federal lease; or

(ii) As an alternative, show that—

(A) The acreage to be added does not contain known deposits of the same mineral deposit; and

(B) The adjoining acreage will be used for surface activities that are necessary for the recovery of the mineral deposit on the original Federal lease, and

(C) Had the acreage been included in the original Federal lease at the time of that lease's issuance, the original Federal lease would have been reasonably compact.

■ 4. Amend § 3510.15 by revising paragraph (e), redesignating paragraphs (f) and (g) as paragraphs (g) and (h), respectively, by adding new paragraph (f), and by revising redesignated paragraph (h), to read as follows:

§ 3510.15 What will the BLM do with my application?

* * * * *

(e) The lands for which you applied for a fringe acreage lease lack sufficient reserves of the mineral resource to warrant independent development;

(f)(1) The lands for which you applied for a lease modification contain known deposits of the same mineral deposit that can be mined only as part of the mining operations on the original Federal lease; or

(2)(i) The acreage to be added does not contain known deposits of the same mineral; and

(ii) The acreage to be added will be used for surface activities that are necessary for the recovery of the mineral deposit on the original Federal lease; and

(iii) Had the acreage added by the modification been included in the original Federal lease at the time of that lease's issuance, the original Federal lease would have been reasonably compact.

* * * * *

(h) You meet the qualification requirements for holding a lease described in subpart 3502 of this chapter and the new or modified lease will not cause you to exceed the acreage limitations described in § 3503.37.

[FR Doc. E9–34 Filed 1–6–09; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket No. FEMA–8055]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date.

DATES: *Effective Date:* The effective date of each community's scheduled suspension is the third date (''Susp.'') listed in the third column of the following tables.

FOR FURTHER INFORMATION CONTACT: If you want to determine whether a particular community was suspended on the suspension date or for further information, contact David Stearrett, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2953.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the NFIP, 42 U.S.C. 4001 *et seq.*; unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**.

In addition, FEMA has identified the Special Flood Hazard Areas (SFHAs) in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may legally be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year, on FEMA's initial flood insurance map of the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Considerations. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This rule meets the applicable standards of Executive Order 12988.

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

■ Accordingly, 44 CFR part 64 is amended as follows:

PART 64—[AMENDED]

■ 1. The authority citation for part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

§ 64.6 [Amended]

■ 2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain federal assistance no longer available in SFHAs
Region III				
Virginia:				
Boones Mill, Town of, Franklin County	510062	January 21, 1975, Emerg; September 1, 1978, Reg; December 16, 2008, Susp.	Dec. 16, 2008 ...	Dec. 16, 2008
Franklin County, Unincorporated Areas	510061	May 23, 1974, Emerg; May 19, 1981, Reg; December 16, 2008, Susp.	.....do *	Do.
Richmond County, Unincorporated Areas.	510310	January 20, 1975, Emerg; March 16, 1989, Reg; December 16, 2008, Susp.	.....do	Do.
Rocky Mount, Town of, Franklin County	510291	June 18, 1975, Emerg; May 1, 1980, Reg; December 16, 2008, Susp.	.....do	Do.
Region IV				
Alabama:				
Bridgeport, Town of, Jackson County ...	015009	July 18, 1974, Emerg; July 18, 1985, Reg; December 16, 2008, Susp.	.....do	Do.
Dutton, Town of, Jackson County	010353	July 7, 1976, Emerg; March 18, 1985, Reg; December 16, 2008, Susp.	.....do	Do.
Hollywood, Town of, Jackson County ...	010111	July 26, 1974, Emerg; September 29, 1986, Reg; December 16, 2008, Susp.	.....do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain federal assistance no longer available in SFHAs
Paint Rock, Town of, Jackson County ..	010214	July 30, 1975, Emerg; June 17, 1986, Reg; December 16, 2008, Susp.	.....do	Do.
Scottsboro, City of, Jackson County	010112	June 26, 1974, Emerg; September 18, 1985, Reg; December 16, 2008, Susp.	.....do	Do.
Stevenson, Town of, Jackson County ...	010113	October 16, 1974, Emerg; December 17, 1987, Reg; December 16, 2008, Susp.	.....do	Do.
Tennessee:				
Blaine, City of, Grainger County	470398	November 26, 1988, Emerg; December 5, 1990, Reg; December 16, 2008, Susp.	.....do	Do.
Jefferson City, Town of, Jefferson County.	475430	October 23, 1970, Emerg; April 9, 1971, Reg; December 16, 2008, Susp.	.....do	Do.
Region V				
Ohio:				
Magnetic Springs, Village of, Union County.	390839	April 30, 1999, Emerg; July 1, 2000, Reg; December 16, 2008, Susp.	.....do	Do.
Marysville, City of, Union County	390548	April 30, 1975, Emerg; April 2, 1986, Reg; December 16, 2008, Susp.	.....do	Do.
Milford Center, Village of, Union County	390662	May 14, 1975, Emerg; June 2, 1995, Reg; December 16, 2008, Susp.	.....do	Do.
Richwood, Village of, Union County	390549	July 11, 1975, Emerg; April 17, 1995, Reg; December 16, 2008, Susp.	.....do	Do.
Union County, Unincorporated Areas ...	390808	March 16, 1977, Emerg; September 27, 1991, Reg; December 16, 2008, Susp.	.....do	Do.
Region VI				
New Mexico:				
Eunice, City of, Lea County	350028	August 18, 1975, Emerg; August 22, 1978, Reg; December 16, 2008, Susp.	.....do	Do.
Hobbs, City of, Lea County	350029	September 20, 1976, Emerg; July 16, 1991, Reg; December 16, 2008, Susp.	.....do	Do.
Jal, City of, Lea County	350030	September 28, 1977, Emerg; August 19, 1985, Reg; December 16, 2008, Susp.	.....do	Do.
Tatum, Town of, Lea County	350032	October 16, 1980, Emerg; July 1, 1988, Reg; December 16, 2008, Susp.	.....do	Do.

*do = Ditto.
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: December 12, 2008.

Michael K. Buckley,

Acting Assistant Administrator, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. E9–17 Filed 1–6–09; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 580

[Docket No. NHTSA–2008–0116; Notice 2]

Petition for Approval of Alternate Odometer Disclosure Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of final determination.

SUMMARY: The Commonwealth of Virginia has petitioned for approval of alternate requirements governing certain aspects of Federal odometer law. NHTSA is issuing a final determination granting Virginia's petition.

DATES: *Effective Date:* February 6, 2009. Request for reconsideration due no later than February 23, 2009.

ADDRESSES: Requests for reconsideration must be submitted in writing to Administrator, National Highway Traffic Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590. Requests should refer to the docket and notice number above.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://www.gpoaccess.gov/fr.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or the street address listed above. Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: Nicholas Englund, Office of the Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590 (Telephone: 202–366–5263) (Fax: 202–366–3820).

SUPPLEMENTARY INFORMATION:

I. Introduction

The Commonwealth of Virginia petitioned NHTSA to approve the Commonwealth's requirements on the disclosure of motor vehicle mileage when motor vehicles are transferred, which would apply in lieu of certain federal requirements, under 49 U.S.C. 32701, 32705(d). As described in detail in Section III below, Virginia's program will provide for the transfer of a vehicle's title with odometer disclosure information electronically, instead of through the execution of a paper title that is then submitted to the state for the issuance of a title to the new owner, for an in-state transaction where there is no security interest in the vehicle. NHTSA

issued an initial determination proposing to grant Virginia's petition. *See* Petition for Approval of Alternate Odometer Disclosure Requirements, Proposed rule; notice of initial determination, 73 FR 35617 (June 24, 2008). In its initial determination, NHTSA reviewed the statutory background and set out the agency's tentative view on applicable factors governing whether to grant a state's petition. NHTSA came to the tentative conclusion that Virginia's proposed alternate requirements met the statutory requirements for approval and invited public comment. After careful consideration of comments, NHTSA's final determination analysis is set forth below in section VI.

II. Statutory Background

A. The Cost Savings Act

In 1972, Congress enacted the Motor Vehicle Information and Cost Savings Act (Cost Savings Act), among other things, to protect purchasers of motor vehicles from odometer fraud. *See* Public Law 92–513, 86 Stat. 947, 961–63 (1972).

To assist purchasers to know the true mileage of a motor vehicle, Section 408 of the Cost Savings Act required the transferor of a motor vehicle to provide written disclosure to the transferee in connection with the transfer of ownership of the vehicle. *See* Public Law 92–513, § 408, 86 Stat. 947 (1972). Section 408 required the Secretary to issue rules requiring the transferor to give a written disclosure to the transferee in connection with the transfer of the vehicle. 86 Stat. 962–63. The written disclosure was to include the cumulative mileage registered on the odometer, or disclose that the actual mileage is unknown, if the odometer reading is known to the transferor to be different from the number of miles the vehicle has actually traveled. The rules were to prescribe the manner in which information shall be disclosed under this section and in which such information shall be retained. *Id.* Section 408 further stated that it shall be a violation for any transferor to violate any rules under this section or to knowingly give a false statement to a transferee in making any disclosure required by such rules. *Id.* The Cost Savings Act also prohibited disconnecting, resetting, or altering motor vehicle odometers. *Id.* The statute subjected violators to civil and criminal penalties and provided for Federal injunctive relief, State enforcement, and a private right of action.[1]

There were shortcomings in the odometer provisions of the Cost Savings Act. Among others, in some states, the odometer disclosure statement was not on the title; it was a separate document that could easily be altered or discarded and did not travel with the title. Consequently, it did not effectively provide information to purchasers about the vehicle's mileage. In some states, the title was not on tamper-proof paper. The problems were compounded by title washing through states with ineffective controls. In addition, there were considerable misstatements of mileage on vehicles that had formerly been leased vehicles, as well as on used vehicles sold at wholesale auctions.

B. The Truth in Mileage Act

In 1986, Congress enacted the Truth in Mileage Act (TIMA), which added provisions to the odometer provisions of the Cost Savings Act. *See* Public Law 99–579, 100 Stat. 3309 (1986). The TIMA amendments expanded and strengthened Section 408 of the Cost Savings Act.

Among other requirements, TIMA precluded the licensing of vehicles, the ownership of which was transferred, for use in any State unless several requirements were met by the transferee and transferor. The transferee, in submitting an application for a title, is required to provide the transferor's (seller's) title, and if that title contains a space for the transferor to disclose the vehicle's mileage, that information must be included and the statement must be signed and dated by the transferor.

TIMA also precluded the licensing of vehicles, the ownership of which was transferred, for use in any State unless several titling requirements were met. Titles must be printed by a secure printing process or other secure process. They must indicate the mileage and contain space for the transferee to disclose the mileage in a subsequent transfer. As to leased vehicles, the Secretary was required to publish rules requiring the lessor of vehicles with leases to advise its lessee that the lessee is required by law to disclose the vehicle's mileage to the lessor upon the lessor's transfer of ownership of the vehicle. In addition, TIMA required that auction companies establish and maintain records on vehicles sold at the auction, including the name of the most recent owner of the vehicle, the name of the buyer, the vehicle identification number and the odometer reading on the date the auction took possession of the vehicle.[2]

As amended by TIMA, section 408(f)(1) of the Cost Savings Act provided that its provisions on mileage statements for licensing of vehicles (and rules involving leased vehicles) apply in a State, unless the State has in effect alternate motor vehicle mileage disclosure requirements approved by the Secretary. Section 408(f)(2) stated that ''[t]he Secretary shall approve alternate motor vehicle mileage disclosure requirements submitted by a State unless the Secretary determines that such requirements are not consistent with the purpose of the disclosure required by subsection (d) or (e), as the case may be.''

[1] In 1976, Congress amended the odometer disclosure provisions in the Cost Savings Act to provide further protections to purchasers from unscrupulous car dealers. *See* Public Law 94–364, 90 Stat. 981, 983 (1976). It amended section 408(b) and added new subsection 408(c) requiring that no transferor shall violate any rule prescribed under this section or give a false statement to a transferee in making any disclosure required by such rule and no transferee who, for purposes of resale, acquires ownership of a motor vehicle shall accept any written disclosure required by any rule under this section if such disclosure is incomplete.

[2] Section 408 of the Cost Savings Act, with the TIMA amendments, provided in pertinent part (100 Stat. 3309–3310):

(d)(1)(A) Any motor vehicle the ownership of which is transferred may not be licensed for use in any State unless the transferee, in submitting an application to a State for the title upon which such license will be issued, includes with such application the transferor's title and, if that title contains the space referred to in paragraph (2)(A)(iii), a statement, signed and dated by the transferor, of the mileage disclosure required under subsection (a).

(B) This paragraph shall not apply to any transfer of ownership of a motor vehicle which has not been licensed before the transfer.

(2)(A) Any motor vehicle the ownership of which is transferred may not be licensed for use in any State unless the title which is issued by the State to the transferee following such transfer—

(i) is set forth by means of a secure printing process (or other secure process);

(ii) indicates the mileage disclosure required to be made under subsection (a); and

(iii) contains a space for the transferee to disclose (in the event of a future transfer) the mileage at the time of such future transfer and to sign and date such disclosure.

(B) The requirements of subparagraph (A) shall not be construed to require a State to verify, or preclude the State from verifying, the mileage information contained in the title.

(e)(1) In the case of any leased motor vehicle, the rules under subsection (a) shall require written disclosure regarding mileage to be made by the lessee to the lessor upon the lessor's transfer of ownership of the leased motor vehicle.

(2) Under such rules, the lessor of a leased motor vehicle shall provide written notice to the lessee regarding—

(A) such mileage disclosure requirements, and

(B) the penalties for failure to comply with them.

(3) The lessor shall retain the disclosure made by any lessee with respect to any motor vehicle under paragraph (1) for a period of at least 4 years following the date the lessor transfers that vehicle.

C. Amendments Following the Truth in Mileage Act and the 1994 Recodification of the Cost Savings Act

In 1988, Congress amended section 408(d) of the Cost Savings Act to permit the use of a secure power of attorney in circumstances where the title was held by a lienholder. The Secretary was required to publish a rule to implement the provision. *See* Public Law 100–561 § 40, 102 Stat. 2805, 2817 (1988), which added Section 408(d)(2)(C). In 1990, Congress amended section 408(d)(2)(C) of the Cost Savings Act. The amendment addressed retention of powers of attorneys by states and provided that the rule adopted by the Secretary not require that a vehicle be titled in the State in which the power of attorney was issued. *See* Public Law 101–641 § 7(a), 104 Stat. 4654, 4657 (1990).[3]

In 1994, in the course of the 1994 recodification of various laws pertaining to the Department of Transportation, the Cost Savings Act, as amended by TIMA, was repealed. It was reenacted and recodified without substantive change. *See* Public Law 103–272, 108 Stat. 745, 1048–1056, 1379, 1387 (1994). The statute is now codified at 49 U.S.C. 32705 *et seq.* In particular, section 408(a) of the Cost Savings Act was recodified at 49 U.S.C. 32705(a). Sections 408(d) and (e), which were added by TIMA (and later amended), were recodified at 49 U.S.C. 32705(b) and (c). The provisions pertaining to approval of State alternate motor vehicle mileage disclosure requirements were recodified at 49 U.S.C. 32705(d).

III. Virginia's Petition

As explained in NHTSA's initial determination, Virginia proposes to allow parties to transfer title through the Internet by electronic means and to maintain an electronic record of the title in the Virginia Department of Motor Vehicles (VADMV) system. The VADMV system would permit the transferee to request a hard copy of the title, printed by a secure printed process. The title will reside as an electronic record with the VADMV, but a hard copy of the title will be generated for the transferee, if requested.[4]

The Virginia petition states that its proposal would permit ''the transferor to disclose the odometer mileage to the transferee and the transferee to view and acknowledge receipt of the transferor's disclosure in connection with the sale of a motor vehicle, as part of a secure on-line transaction with the VADMV.'' Under Virginia's proposal, to complete a sale of the motor vehicle, the owner of the vehicle (transferor), and the purchaser of the vehicle (transferee) would be required to perform several steps after they agree upon the sale. Included in this process is the creation and use of electronic signatures.[5]

Under Virginia's petition, an electronic signature would be created during the process of transferring the title. According to VADMV, the customer number, unique personal identification number (PIN), and date of birth (DOB) of the customer will be used in combination to create the electronic signature for each transferor and transferee. Thus, as a threshold matter, the process for transferring title would require both the transferor and the transferee to obtain a PIN from the VADMV.[6]

The online transaction begins when the transferor logs on to the VADMV's Web site using his/her customer number, DOB, and PIN to verify the transferor's identity. These also would be used to create the electronic signature of the transferor. The transferor would then select the ''vehicle transfer of ownership'' transaction and either choose the vehicle from a displayed list of eligible vehicles or enter the vehicle's VIN. The transferor would then enter the vehicle sales price, the odometer reading, and brand regarding the mileage disclosure (Actual, Not Actual, or Exceeds). After entering this data, the VADMV system will provide the transferor with a unique transaction number. The transferor must provide the unique transaction number to the transferee to complete the transaction. The VADMV system will also prompt the transferor to mail the existing vehicle title to the VADMV for destruction. According to the Virginia petition, if the transferor fails to return the existing vehicle title to the VADMV, the title is invalidated in the VADMV system and would be unable to transfer title in Virginia.

The transaction would remain in ''pending'' status with VADMV until the transferee logs on to complete the transfer of ownership transaction. Meanwhile, the VADMV system would automatically check the odometer reading entered by the transferor against the odometer reading on the VADMV system. If the odometer reading entered by the transferor is lower, the transaction will be immediately rejected and referred to the VADMV Law Enforcement Services Division for an investigation.

The transferee would then log on to VADMV's Web site, using his/her customer number, DOB, and PIN (this would be the transferee's electronic signature). The transferee would select the pending vehicle transfer of ownership transaction, and he/she would enter the unique transaction number that was provided by the transferor in order to obtain access to the pending transaction. Once such access is obtained, the transferee would verify the sales price, odometer reading, and brand that were entered by the transferor. The transaction would be processed if all the data entered by the transferor is verified and acknowledged as correct by the transferee. Ownership of the vehicle would transfer to the transferee and an electronic title record would be established by VADMV. The VADMV would then maintain the electronic title and would issue a paper title upon the request of the transferee.

If the transferee does not agree with the information entered by the transferor, then the VADMV system will reject the transaction. The transferor will have the opportunity to correct the sales price, odometer reading, and brand for the rejected transaction. The transferee would then re-verify the information to ensure the accuracy. A second discrepancy would result in cancellation of the electronic transaction.

Virginia's petition asserts that its proposed alternate odometer disclosure is consistent with Federal odometer law, but it did not address the purposes of TIMA. As advanced by VADMV, Virginia's alternative ensures that a fraudulent odometer disclosure can readily be detected and reliably traced to a particular individual by providing a means for the VADMV to validate and authenticate the electronic signatures of

[3] NHTSA reviewed this legislative history in 1991 when adopting the current regulations governing powers of attorney. *See* Odometer Disclosure Requirements, Final Rule, 56 FR 47681 (Sept. 20, 1991).

[4] In the Initial Determination, NHTSA addressed the question of where the title would reside. Virginia did not comment on NHTSA's discussion.

[5] The term ''electronic signature'' means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record. 15 U.S.C. 7006(5) (2004).

[6] According to Virginia, the process whereby a customer obtains a PIN is currently in place, as a PIN already provides a secure and confidential Internet access to VADMV services and is required in order to conduct a number of on-line transactions. In order to obtain a PIN, a customer must provide his or her unique customer number and date of birth and certify, under penalty of perjury, that the customer number and DOB submitted in the PIN request belong to the customer requesting the PIN. Within three (3) business days of the customer's request, the VADMV mails a randomly generated 4-digit PIN to the customer by first class mail, and the assigned PIN is encrypted on the customer's VADMV record. In order to conduct a transaction on VADMV's Internet Web site, the customer is prompted to enter the VADMV assigned PIN and the Web site will prompt the customer to personalize his/her PIN for added security.

both parties. This verification is done through the generation of the customer number and unique PIN that are provided to customers of the VADMV. Virginia states that this unique electronic signature can be quickly and reliably traced to a particular individual.

Second, Virginia states that the electronic odometer disclosure provided by the transferor will be available to the transferee at the time ownership of the vehicle is transferred. During the transfer-of-ownership transaction, the transferee would view the odometer reading and brand information that was supplied by the transferor, thereby ensuring that the transferee is aware of the vehicle's mileage as well as any problem with the odometer that was disclosed by the transferor.

Third, VADVM asserts that its proposal provides a level of security equivalent to that of a disclosure on a secure title document. According to Virginia, the unique electronic signatures (customer number, PIN, and DOB) utilized by each party to the transaction in addition to the unique transaction number generated by the VADMV ensure secure access to the on-line transaction and a reliable means of verifying the identities and electronic signatures of each individual. In addition, Virginia notes added security in its proposal because the information from the transferor and transferee must match exactly. If a discrepancy exists that is not corrected, the transaction would automatically be rejected and transfer of ownership would not take place. Virginia states that the same process would be used in dealer transactions with additional safeguards.[7] The additional safeguards will include a requirement that a dealership notify the VADMV of employees authorized to do titling activities for the dealership. This authorization will be stored by the VADMV on-line system. When the employee logs onto the VADMV on-line system, he or she will also be requested to enter the dealer number that is assigned by the VADMV and the employee's logon information. If the VADMV does not show an authorization by the dealership, the employee will not be eligible to continue with the transaction for that dealership.

Virginia refers to an April 25, 2003 letter by former NHTSA Chief Counsel, Jacqueline Glassman, stating that an electronic signature in the lessee-to-lessor context satisfies the requirement for a written disclosure under 49 CFR 580.7(b).[8] Virginia contends that the written disclosure requirements under 49 CFR 580.7(b) are no different than those under 49 CFR 580.5(c). It also maintains that the electronic record and signature aspects of its proposal comport with the Electronic Signatures in Global and National Commerce Act (E-Sign), 15 U.S.C. 7001 *et seq.,* and Virginia's Uniform Electronic Transactions Act (UETA), Va. Code 46.2–629. Last, Virginia notes that it does not have regulations in effect that address odometer mileage disclosure requirements. Current state law permits the creation of electronic certificates of title, but requires a paper certificate of title for all transfers of vehicle ownership. Va. Code 46.2–603. When approved, VADMV will seek legislation to amend Section 46.2–603 to implement the alternate odometer disclosure requirements.

IV. Summary of Public Comments

NHTSA received thirteen comments from the following entities: (1) The Texas Department of Transportation; (2) the Iowa Department of Transportation—Motor Vehicle Division; (3) Oregon Driver and Motor Vehicle Services; (4) the Wisconsin Department of Transportation; (5) the Michigan Department of State; (6) the National Auto Auction Association (NAAA); (7) the American Financial Services Association (NTSF); (8) triVIN, Inc. (a company which provides automated title and registration transaction processing and business process outsourcing solutions); (9) the Alabama Department of Revenue; (10) the National Automobile Dealers Association (NADA); (11) the South Carolina Department of Motor Vehicles; (12) the Nevada Department of Motor Vehicles; and, (13) United Parcel Service (UPS). Below is a discussion of the comments NHTSA received.

Of the thirteen comments received, nine commenters support Virginia's petition without reservation (the Texas Department of Transportation, the Iowa Department of Transportation—Motor Vehicle Division, Oregon Driver and Motor Vehicle Services, the Wisconsin Department of Transportation, NTSF, triVIN, Inc., the Alabama Department of Revenue, NADA, and UPS). For example, the Iowa Department of Transportation states that NHTSA's initial determination analysis was ''well reasoned'' and leads to the correct initial determination—to preliminarily grant the Commonwealth's petition. Oregon Driver and Motor Vehicle Services notes that, in its view, the method offered by Virginia for capturing and retaining odometer disclosure information provides a more secure process than currently provided for in Federal law. UPS notes that it has worked with VADMV since 1999 on automating the registration and title of new commercial vehicles. UPS stated that it does not receive ''hard copy'' paper titles and allows titles to reside electronically with VADMV. In practice, when UPS does require a paper title, such as for the disposition of a vehicle, UPS can electronically request a copy from VADMV, which is then printed, sent, and received within a few days. UPS states that in its experience the automation of these types of routine but necessary transactions and the elimination of paper documents, unless needed, saves time, costs, and unnecessary trips to VADMV offices.

Four of the nine commenters who support Virginia's petition go further, and request that NHTSA allow all states to enact similar disclosure systems without the need to file separate petitions (the Texas Department of Transportation, NTSF, NADA, and triVIN, Inc.).[9]

In addition to the nine commenters that support Virginia's petition without reservation, three additional commenters indicate support for the Virginia petition, but raise certain concerns: the South Carolina Department of Motor Vehicles, the Michigan Department of State, and NAAA. The concerns are not in connection with why, in the view of the commenters, Virginia's proposed alternate requirements would not be consistent with the purpose of the disclosure required by subsection (d) or (e) of Section 408 of the Cost Savings Act, as is required under the standard set forth in Section 408(f)(2) of the Cost Savings Act. Instead, the concerns relate to how Virginia's proposal would operate in practice.

[7] Under the VADMV program, dealers will continue to be subject to the dealer retention requirements as set forth in 49 CFR 580.8(a), which requires dealers and distributors to retain a copy of odometer disclosure statements that they issue and receive for five years. These requirements are not based upon the TIMA amendments that added Section 408(d) to the Cost Savings Act.

[8] 49 CFR 580.7, Disclosure of odometer information for leased motor vehicles, governs lessee-to-lessor disclosures.

[9] NTSF and the Texas Department of Transportation requested a final rule that defines electronic signatures using the ESIGN Act and allows any electronic signature for odometer disclosures where the process of obtaining the signature and disclosing the odometer mileage is consistent with TIMA purposes. NADA and triVIN encourage NHTSA to amend disclosure regulations to allow all states to take advantage of electronic titling by outlining alternate electronic odometer disclosure requirements.

For example, the South Carolina Department of Motor Vehicles questions how Virginia would approach liens and powers of attorney, questions which, as NHTSA explained in its initial determination, are outside of the scope of Virginia's petition.[10] The Michigan Department of State, at the outset, states that Virginia's petition is consistent with Federal odometer standards. However, it notes that many states, including Michigan, require dealers to possess assigned certificates of title prior to transfer to the buyer, typically accomplished by holding a paper title. It notes that Virginia's petition would require Virginia owners to obtain a paper title for out-of-state transfers, thereby adding complication to out-of-state transactions.[11] NAAA states that it generally supports Virginia's proposal. However, it contends that Virginia's approach may be an impediment to interstate transfers due to the three day wait period for a PIN. NAAA contends that this wait period creates an impediment to out-of-state wholesale purchasers and sellers; per NAAA, without the ability to make a same-day transaction, potential purchasers may steer clear of auto auctions potentially involving Virginia titles. NAAA, therefore, proposes that Virginia's petition serve as an optional method for Virginians to transfer title while keeping paper transfers as a valid procedure, even for vehicles issued electronic titles. However, to the extent Virginia's proposal does not continue to support traditional paper transfers as an option, NAAA does not support the petition.

Only one of thirteen commenters does not support Virginia's petition: The Nevada Department of Motor Vehicles. It contends that an electronic titling process would be more time consuming and expensive than existing paper systems and raises questions as to how the system would operate in practice, particularly in connection with how Virginia's electronic system would recognize mileage differences entered by the buyer and seller. The Nevada Department of Motor Vehicles also raises concerns in connection with the purposes of TIMA. It contends that, under Virginia's petition, unless requested by the buyer, vehicles could be transferred multiple times without a paper title. By eliminating paper titles, the Nevada Department of Motor Vehicles recognizes that the likelihood of attempted alterations would decrease. However, it contends that it may be easier to pass branded titles because not all states use the National Motor Vehicle Title Information System (NVMTIS). The Nevada Department of Motor Vehicles further contends that for a vehicle coming from such a state into Virginia, VADMV would not have the odometer reading in its system, save for what the transferor enters, thus creating the potential to launder out-of-state titles through Virginia.

V. Statutory Purposes of TIMA

The Cost Savings Act, as amended by TIMA in 1986, contains a specific provision on approval of State alternative odometer disclosure programs. Subsection 408(f)(2) of the Cost Savings Act (now recodified at 49 U.S.C. 32705(d)) provides that NHTSA shall approve alternate motor vehicle mileage disclosure requirements submitted by a State unless NHTSA determines that such requirements are not consistent with the purpose of the disclosure required by subsection (d) or (e) as the case may be. (Subsections 408(d), (e) of the Costs Savings Act were recodified to 49 U.S.C. 32705(b) and (c)). In light of this provision, an important question is what are the purpose(s) of the disclosure required by section 408(d), (e) of the Cost Savings Act as amended by TIMA. We now turn to our interpretation of the purposes of these subsections, as germane to Virginia's petition.[12]

In the initial determination, NHTSA set forth its tentative view of the purpose(s) of the disclosure required by section 408(d) of the Cost Savings Act as amended by TIMA. NHTSA also provided a full opportunity for comment, including on the statutory purposes that govern the resolution of a state's petition. As noted above, most commenters agreed with NHTSA's initial determination. While some expressed concern about how Virginia's program would operate in practice, none disagreed with NHTSA's delineation of the purposes of the disclosure under TIMA. Indeed, no commenter directly addressed the purposes of TIMA set forth in our initial determination. In these circumstances, and upon careful consideration, the agency adopts the statement of the purposes in the initial determination, which are set out below.

One purpose of TIMA was to assure that the form of the odometer disclosure precluded odometer fraud. To prevent odometer fraud, which was facilitated in some States by disclosure statements that were separate from titles, under TIMA the disclosure must be contained on the title provided to the transferee and not on a separate document. Related to this, the title was required to contain space for the disclosures. The Senate Report associated with TIMA noted that Federal law had not specified the form in which the odometer reading disclosure must be made. *See* S. Rep. No. 99–47, at 3 (1985), *reprinted in* 1986 U.S.C.C.A.N. 5620. In some States, where the disclosure statement was on a separate piece of paper from the vehicle's title, the transferor could easily alter it or provide a new statement with a different mileage. The vehicle could be titled with a lower mileage than in the transferor's disclosure in a State that does not require an odometer reading on the title. *Id.* In this regard, in some States there was no place for recording the odometer reading on the title when the vehicle was sold. *Id.* at 2. A consequence of these practices was that the new title contained no odometer reading and the purchaser/wholesaler could then disclose whatever odometer reading it chose. *Id.*

Another purpose of TIMA was to prevent odometer fraud by processes and mechanisms making the disclosure of an odometer's mileage on the title a condition of the application for a title, and a requirement for the title issued by the State. Prior to TIMA, odometer fraud was facilitated by the ability of transferees to apply for titles without presenting the transferor's title with the disclosure. To eliminate or significantly

[10] Additionally, the bulk of the South Carolina Department of Motor Vehicles' comments raise matters that NHTSA could only address in a rulemaking of general application to the states for electronic titling. For example, the South Carolina Department of Motor Vehicles contends other states' technological and legal restrictions may prevent a state from enacting the type of electronic disclosure proposed by Virginia. It contends that NHTSA should provide each state enough flexibility to create a system that satisfies TIMA's purposes while staying within specific state restrictions. NHTSA appreciate these suggestions. However, as noted above, this approach is not authorized by Section 408(f)(2) of the Cost Savings Act, and is neither within the scope of Virginia's petition nor NHTSA's initial determination.

[11] The Michigan Department of State also questions how data fields would be presented by VADMV to potential transferors to fulfill TIMA's purposes of title disclosures—for instance, how a transferor would be alerted to a salvaged title. The Michigan Department of State thus requested clarification on what information or data fields would be made available for parties to a transaction. The Michigan Department of State also questions how Virginia's approach would handle multiple sellers or purchasers, or how liens would be discharged and perfected, but conceded that those matters were beyond the scope of Virginia's petition. The Michigan Department of State also requested clarification on what appeals are available to a customer who accepted a transaction and later realizes he/she made an error in accepting the transaction.

[12] Virginia's petition does not address, among others, disclosures involving leased vehicles. In view of the scope of Virginia's petition, Virginia will continue to be subject to current Federal requirements as to leased vehicles and in this notice we do not address the purposes of the related provisions.

reduce abuses associated with this lack of controls, TIMA required that a vehicle, the ownership of which is transferred, may not be licensed unless the application for the title is accompanied by the title of such vehicle. Thus, ''in the case of an application for a new motor vehicle certificate of title, if the prior owner's title certificate contains a space for the disclosure of the mileage, when the title certificate is submitted to the State * * *, it shall contain a statement, signed and dated by the prior owner, of the mileage required to be disclosed by the prior owner.'' *See* S. Rep. No. 99–47, at 2–3 (1985), *reprinted in* 1986 U.S.C.C.A.N. 5620, 5625–26, *see also* Cost Savings Act, as amended by TIMA, § 408(d), 49 U.S.C. 32705(b).

TIMA also sought to prevent alterations of disclosures on titles and to preclude counterfeit titles through secure processes. In furtherance of these purposes, in the context of paper titles, under TIMA the title must be set forth by means of a secure printing process. It could also be set forth by other secure process that might evolve in the future. As noted in the legislative history, because the title could be printed through a non-secure process, persons could alter it or launder it. *See* S. Rep. No. 99–47, at 3 (1985), *reprinted in* 1986 U.S.C.C.A.N. 5620. The House Report noted that '''[o]ther secure process' is intended to describe means other than printing which could securely provide for the storage and transmittal of title and mileage information.'' H.R. Rep. No. 99–833, at 33 (1986). ''In adopting this language, the Committee intends to encourage new technologies which will provide increased levels of security for titles.'' *Id. See also* Cost Savings Act, as amended by TIMA, § 408(d), 49 U.S.C. 32705(b).

Another purpose was to create a record of the mileage on vehicles and a paper trail. The underlying purposes of this record and trail was to enable consumers to be better informed and provide a mechanism through which odometer tampering can be traced and violators prosecuted. The creation of a paper trail would improve the enforcement process by providing evidence of fraudulent transfers, including by consumers and the individuals engaged in such practices. More specifically, the paper trail would document transfers and create evidence showing the incidence of odometer rollbacks. Under TIMA, as part of the paper trail, the title must include a space for the mileage of the vehicle. New applications for titles must include a mileage disclosure statement signed by the prior owner of the vehicle. There would be a permanent record on the vehicle's title at the place where the vehicle is titled, usually the State motor vehicle administration. This record could be checked by subsequent owners or law enforcement officials, who would have a critical snapshot of the vehicle's mileage at every transfer, which is the fundamental link in the paper trail for enforcement. These provisions were aimed at providing purchasers and law enforcement with the much-needed tools to combat odometer fraud. The House Report associated with TIMA focused on the lack of evidence or ''paper trail'' showing the incidence of rollbacks as one of the major barriers to decreasing odometer fraud. H.R. Rep. No. 99–833, at 18 (1986). The House Report noted that a purpose of section 408(d), which required the seller to disclose the mileage on the title and titles to include the mileage disclosure and a space for recording mileage on the next transfer, is to create a permanent record or paper trail for car owners and law enforcement and other State officials to track odometer fraud. *Id.* A permanent record on the vehicle's title would be maintained at the place where it is titled. *Id.* Thus, the underlying purpose of this record and trail was to enable consumers to be better informed and provide a mechanism through which odometer tampering can be traced and violators prosecuted. *See* Cost Savings Act, as amended by TIMA, § 408(d), 49 U.S.C. 32705(b).

Moreover, the general purpose of TIMA was to protect consumers by assuring that they received valid representations of the vehicle's actual mileage at the time of transfer based on odometer disclosures. The TIMA amendments were directed at resolving shortcomings in the Cost Savings Act.

VI. NHTSA's Final Determination

In this part, NHTSA considers the Virginia program in light of the purposes of the disclosure required by subsection (d) of section 408.[13]

As an initial matter, under section 408(f)(2) of the Cost Savings Act, the standard is that NHTSA ''shall'' approve alternate motor vehicle mileage disclosure requirements submitted by a State unless NHTSA determines that such requirements are not consistent with the purpose of the disclosure required by subsection (d) or (e) of section 408, as the case may be. The purposes of the odometer disclosure are discussed above, as is the Virginia program.

The majority of the commenters agreed with the initial determination. Of those commenters that did not fully support the initial determination, the concerns raised by the South Carolina Department of Motor Vehicles, the Michigan Department of State, and NAAA do not implicate whether or not Virginia's proposed alternate requirements satisfy the purposes of section 408(d) of the Cost Savings Act. In particular, how powers of attorney are handled, how liens are perfected and discharged, how dealers are affected, how the system will handle auto auctions, and the potential costs and time associated with implementing Virginia's system, all fall outside the scope of Virginia's petition[14] and do not implicate whether or not Virginia's proposed alternate requirements are consistent with TIMA.

As to commenters' suggestion that NHTSA allow all states to pursue an approach like Virginia's proposal, such an approach is not within the scope of Virginia's petition nor NHTSA's initial determination. NHTSA, therefore, is unable to address such a request within the scope of NHTSA's final determination here. Also, section 408(f)(2) of the Cost Savings Act contemplates a submission of alternate requirements by a State.

As explained in NHTSA's initial determination, a purpose of TIMA is to assure that the form of the odometer disclosure precludes odometer fraud. NHTSA has determined that Virginia's alternate disclosure requirements satisfy this purpose. Under Virginia's program, the title will reside as an electronic record with the VADMV; however, a hard copy of the title will be generated for the transferee, if requested. Virginia's proposed system will, therefore, continue to have the odometer disclosure on the virtual ''title'' itself, as required by TIMA, and not as a separate document. As to TIMA's requirement that the title contain a space for the transferor to disclose the vehicle's mileage, NHTSA does not believe the electronic transaction Virginia as outlined implicates the space requirement. NHTSA, however, assumes that if a hard copy of the title is requested, Virginia will continue to provide a separate space on the hard copy title, in keeping with TIMA and current practice.

Another purpose of TIMA was to prevent odometer fraud by processes

[13] Since Virginia's program does not cover leased vehicles, the purposes of Section 408(e) of the Cost Savings Act as amended by TIMA are not germane.

[14] NHTSA's final determination does not address odometer requirements that are not based on Section 408(d) of the Cost Savings Act, as codified at 49 U.S.C. 32705(b). Virginia will continue to be subject to all Federal requirements that are not based on Section 408(d).

and mechanisms making the disclosure of an odometer's mileage on the title a condition of the application for a title and a requirement for the title issued by the State. During the proposed on-line process for retitling, the disclosure of odometer information occurs during the transfer of ownership and a title is required by Virginia's proposal to complete the transaction. During the on-line transaction, the transferor is instructed to mail the existing title to the VADMV for destruction.[15] If the transaction is successful, the VADMV will retain an electronic title, which includes a record of the transaction and the odometer disclosure information.

Another purpose of TIMA is to prevent alterations to disclosures on titles and to preclude counterfeit titles, through secure processes. In this regard, NHTSA has determined that Virginia's proposed process satisfies this purpose. By eliminating paper titles, the Nevada Department of Motor Vehicles concedes that the likelihood of attempted alterations would decrease. The Nevada Department of Motor Vehicles did express the concern that, under Virginia's petition, unless requested by the buyer, vehicles could be transferred multiple times without a paper title which may ''serve as a way to pass along branded vehicles.'' Nevada did not explain how this problem would arise. In any event, NHTSA respectfully does not agree. In our view, Virginia's alternate disclosure requirements provide at least equivalent security protections against altering, tampering, or counterfeiting titles to a paper title printed through a secure process. Electronic recordation of the odometer reading decreases the likelihood of any subsequent odometer disclosure being altered by erasures or other methods. Under Virginia's system, once the transaction is completed, VADMV stores an electronic version of the title and may upon request send a paper copy of the title to the transferee. The transferee may never request a paper title, even if there is a subsequent transfer. However, subsequent transferees will view an electronic odometer disclosure at the time of transfer as they verify the transferor's mileage disclosure. Under this system, all subsequent transfers may be performed through the on-line process. Each time an on-line transfer occurs, the VADMV stores the electronic version of the title, and VADMV issues a paper title only upon request. As an electronic title, the likelihood of an individual altering, tampering, or counterfeiting the title is decreased significantly. Moreover, the electronic recordation can detect an attempted alteration or fraudulent disclosure almost immediately. If a transferee requests a paper title, the VADMV will issue a paper title, printed through a secure process, with the requisite odometer information on the title.

Another purpose of TIMA is to create a record of the mileage on vehicles and a paper trail. NHTSA has determined in this matter that Virginia's alternate disclosure requirements provide for a system that creates an equivalent to a ''paper trail'' that assists law enforcement in identifying and prosecuting odometer fraud. NHTSA has analyzed the concern of the Nevada Department of Motor Vehicles that, under Virginia's proposal, it may be easier to pass branded titles because not all states use the National Motor Vehicle Title Information System (NVMTIS). NHTSA does not agree. Here, the paper trail under Virginia's proposal starts with the establishment of the electronic signatures of the parties. The electronic signatures of the transferor and transferee are readily detectable and can be reliably traced to the particular individual due to the system's means for validating and authenticating the electronic signature of each individual. VADMV can validate and authenticate an individual electronic signature because the electronic signature consists of the individual's unique customer number, DOB, and PIN. In order to obtain a unique customer number, VADMV must have an individual's address on file. In order to obtain a PIN, the individual must also certify, under penalty of perjury, that the customer number and DOB submitted in the PIN request belong to the customer requesting the PIN. The customer number and PIN are required to log on to the VADMV system. Based upon the information provided by each individual to the transaction, the VADMV can trace the PIN to the assigned individual. The ability to identify the individuals to the transaction through the electronic signature[16] maintains the purposes behind the creation of a paper trail since the VADMV will have a history of each transfer of the vehicle and can discover incidences of rollbacks. After the transaction is completed, the title is electronically recorded and stored by the VADMV. It includes the mileage of the vehicle at the transfer. These electronic records will create the electronic equivalent to a paper based system and are accessible to law enforcement officials.

Moreover, the overall purpose of TIMA is to protect consumers by assuring that they receive valid representations of the vehicle's actual mileage at the time of transfer based on odometer disclosures. In connection with this TIMA purpose, NHTSA has analyzed the concern of the Nevada Department of Motor Vehicles that, under Virginia's proposal, for a vehicle coming into Virginia from another state, VADMV would not have the odometer reading in its system, save for what the transferor enters, thus creating the potential to launder out-of-state titles through Virginia. Again, NHTSA does not agree. Transactions involving out-of-state titles are outside the scope of Virginia's electronic disclosure proposal. Here, Virginia's alternate disclosure requirements include several prerequisites, including a vehicle titled in Virginia, that make it unlikely that the representations of a vehicle's actual mileage by the transferor to the transferee would be of lesser validity than representations made through a vehicle transfer by paper title and potentially deter odometer fraud better than a paper title. These prerequisites include the verification of the individuals to the transfer transaction through the issuance of a PIN number from VADMV. Virginia's alternate disclosure requirements also include procedures to assure that a transferee verifies the odometer disclosure made by the transferor. In addition, the verification of the odometer reading provides indication of potential fraud to the transferee should the transferor attempt to enter a different mileage into the system than the mileage the transferee observed on the vehicle when the agreement to purchase was made.[17]

For the foregoing reasons, and upon review of the entire record, NHTSA hereby issues a final determination granting Virginia's petition for requirements that apply in lieu of the

[15] If the transferor does not return the existing title to VADMV, the existing title will be invalid once the vehicle transfers to the transferee.

[16] Electronic signatures are generally valid under applicable law. Congress recognized the growing importance of electronic signatures in interstate commerce when it enacted the Electronic Signatures in Global and National Commerce Act (E-Sign). *See* Public Law 106–229, 114 Stat. 464 (2000). E-Sign established a general rule of validity for electronic records and electronic signatures. 15 U.S.C. 7001. It also encourages the use of electronic signatures in commerce, both in private transactions and transactions involving the Federal government. 15 U.S.C. 7031(a).

[17] Further protection is provided by the VADMV system itself. The system automatically cross references the odometer reading entered by the transferor against the odometer reading on the VADMV system. If the odometer reading entered by the transferor is lower than the mileage recorded in the VADMV system, the VADMV system will immediately reject the transaction and refer the individual to the VADMV Law Enforcement Services Division for investigation.

federal requirements adopted under section 408(d) of the Cost Savings Act. Other requirements of the Cost Savings Act continue to apply in Virginia. NHTSA reserves the right to rescind this grant in the event that information acquired after this grant indicates that, in operation, Virginia's alternate requirements do not satisfy one or more applicable requirements.

Authority: 49 U.S.C. 32705; delegation of authority at 49 CFR 1.50 and 501.8.

Issued on: January 2, 2009.

David Kelly,

Acting Administrator.

[FR Doc. E9–43 Filed 1–6–09; 8:45 am]

BILLING CODE 4910–59–P

Proposed Rules

Federal Register
Vol. 74, No. 4
Wednesday, January 7, 2009

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Parts 305 and 319

[Docket No. APHIS–2008–0126]

RIN 0579–AC93

Importation of Hass Avocados From Peru

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the fruits and vegetables regulations to allow the importation of Hass avocados from Peru into the continental United States. As a condition of entry, Hass avocados from Peru would have to be produced in accordance with a systems approach that would include requirements for importation in commercial consignments; registration and monitoring of places of production and packinghouses; grove sanitation; pest-free areas or trapping for fruit flies; surveys for the avocado seed moth; and inspection for quarantine pests by the national plant protection organization of Peru. Hass avocados from Peru would also be required to be accompanied by a phytosanitary certificate with an additional declaration stating that the avocados were grown, packed, and inspected and found to be free of pests in accordance with the proposed requirements. This action would allow for the importation of Hass avocados from Peru into the United States while continuing to provide protection against the introduction of quarantine pests.

DATES: We will consider all comments that we receive on or before March 9, 2009.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2008-0126* to submit or view comments and to view supporting and related materials available electronically.
- *Postal Mail/Commercial Delivery:* Please send two copies of your comment to Docket No. APHIS–2008–0126, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2008–0126.

Reading Room: You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

Other Information: Additional information about APHIS and its programs is available on the Internet at *http://www.aphis.usda.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Alex Belano, Assistant Branch Chief, Commodity Import Analysis and Operations, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737–1231; (301) 734–8758.

SUPPLEMENTARY INFORMATION:

Background

The regulations in ''Subpart—Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–48, referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests that are new to or not widely distributed within the United States.

The national plant protection organization (NPPO) of Peru has requested that the Animal and Plant Health Inspection Service (APHIS) amend the regulations to allow Hass avocados from Peru to be imported into the United States.

As part of our evaluation of Peru's request, we prepared a draft pest risk assessment (PRA), titled ''Importation of 'Hass' Avocado (*Persea americana*) Fruit from Peru into the Continental United States'' (May 2006). The draft PRA evaluated the risks associated with the importation of Hass avocados into the continental United States (the lower 48 States and Alaska) from Peru.

We published a notice [1] in the **Federal Register** on May 25, 2006 (71 FR 30113, Docket No. APHIS–2006–0072) in which we advised the public of the availability of the draft PRA and solicited comments on it for 60 days ending July 24, 2006. We received seven comments by that date, from exporters, importers, members of Congress, a domestic avocado industry association, researchers, and the NPPO of Peru.

We made changes to the May 2006 PRA in response to public comments and peer review comments. The changes we made are summarized in an appendix to the revised PRA. APHIS will accept comments on the revised PRA throughout the comment period for this proposed rule. Copies of the revised PRA, titled ''Importation of 'Hass' Avocado (*Persea americana*) Fruit from Peru into the Continental United States'' (October 2008), may be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT** or viewed on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

The revised PRA identifies six pests of quarantine significance present in Peru that could be introduced into the United States through the importation of Hass avocados:

- *Anastrepha fraterculus* (Wiedemann), the South American fruit fly;
- *Anastrepha striata* Schiner, the guava fruit fly;
- *Ceratitis capitata* (Wiedemann), the Mediterranean fruit fly (Medfly);
- *Coccus viridis* (Green), the green scale;
- *Ferrisia malvastra* (McDaniel), a mealybug; and
- *Stenoma catenifer* Walsingham, the avocado seed moth.

APHIS has determined that measures beyond standard port-of-entry inspection are required to mitigate the risks posed by these plant pests. To recommend specific measures to mitigate those risks, we prepared a risk management document (RMD). Copies of the RMD may be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT** or viewed on the

[1] To view the notice, the draft PRA, and the comments we received, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2006-0072.*

Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

Based on the recommendations of the RMD, we are proposing to allow the importation of Hass avocados from Peru into the continental United States only if they are produced in accordance with a systems approach. The systems approach we are proposing would require:

- Registration, monitoring, and oversight of places of production;
- Grove sanitation;
- Pest-free areas or trapping for *A. fraterculus, A. striata,* and Medfly;
- Surveys for the avocado seed moth;
- Harvesting requirements for safeguarding and identification of the fruit;
- Packinghouse requirements for safeguarding and identification of the fruit; and
- Inspection by the NPPO of Peru for the quarantine pests.

Hass avocados from Peru would also be required to be accompanied by a phytosanitary certificate with an additional declaration stating that the avocados were grown, packed, and inspected and found to be free of pests in accordance with the proposed requirements.

We are proposing to add the systems approach to the regulations in a new § 319.56–49 governing the importation of Hass avocados from Peru into the United States. The mitigation measures in the proposed systems approach are discussed in greater detail below.

Proposed Systems Approach

General Requirements

Paragraph (a) of § 319.56–49 would set out general requirements for the NPPO of Peru and for growers and packers producing avocados for export to the United States.

Paragraph (a)(1) would require the NPPO of Peru to provide a workplan to APHIS that details the activities that the NPPO of Peru will, subject to APHIS' approval of the workplan, carry out to meet the requirements of proposed § 319.56–49. As described in a notice we published on May 10, 2006, in the **Federal Register** (71 FR 27221–27224, Docket No. APHIS–2005–0085), a bilateral workplan is an agreement between APHIS' Plant Protection and Quarantine program, officials of the NPPO of a foreign government, and, when necessary, foreign commercial entities that specifies in detail the phytosanitary measures that will comply with our regulations governing the import or export of a specific commodity. Bilateral workplans apply only to the signatory parties and establish detailed procedures and guidance for the day-to-day operations of specific import/export programs. Bilateral workplans also establish how specific phytosanitary issues are dealt with in the exporting country and make clear who is responsible for dealing with those issues. The implementation of a systems approach typically requires a bilateral workplan to be developed.

Paragraph (a)(1) would also state that the NPPO of Peru must establish a trust fund in accordance with § 319.56–6. Section 319.56–6 of the regulations sets forth provisions for establishing trust fund agreements to cover costs incurred by APHIS when APHIS personnel must be physically present in an exporting country or region to facilitate exports. The systems approach may require APHIS personnel to monitor treatments if they are conducted in Peru.

Paragraph (a)(2) would require the avocados to be grown at places of production that are registered with the NPPO of Peru and that meet the requirements for grove sanitation, pest-free areas or trapping for *A. fraterculus, A. striata,* and Medfly, and surveys for the avocado seed moth that are described later in this document.

Paragraph (a)(3) would require the avocados to be packed for export to the United States in packinghouses that are registered with the NPPO of Peru and that meet the packinghouse requirements for fruit origin, pest exclusion, cleaning, safeguarding, and identification that are described later in this document.

Paragraph (a)(4) would state that avocados from Peru may be imported in commercial consignments only. Produce grown commercially is less likely to be infested with plant pests than noncommercial consignments. Noncommercial consignments are more prone to infestations because the commodity is often ripe to overripe and is often grown with little or no pest control. Commercial consignments, as defined in § 319.56–2, are consignments that an inspector identifies as having been imported for sale and distribution. Such identification is based on a variety of indicators, including, but not limited to: Quantity of produce, type of packaging, identification of grower or packinghouse on the packaging, and documents consigning the fruits or vegetables to a wholesaler or retailer.

Commercially produced avocados are cleaned as part of the packing process. This practice would help to mitigate the risk associated with *C. viridis* and *F. malvastra.* Both of these pests are external pests that would be dislodged by cleaning. In addition, the industry practice of culling damaged fruit would help to ensure that avocados exported from Peru are free of quarantine pests in general.

Monitoring and Oversight

The systems approach we are proposing includes monitoring and oversight requirements in paragraph (b) of proposed § 319.56–49 to ensure that the required phytosanitary measures are properly implemented throughout the process of growing and packing of avocados for export to the United States.

Paragraph (b)(1) would require the NPPO of Peru to visit and inspect registered places of production monthly, starting at least 2 months before harvest and continuing until the end of the shipping season, to verify that the growers are complying with the requirements for grove sanitation and surveys for the avocado seed moth that are discussed later in this document and follow pest control guidelines, when necessary, to reduce quarantine pest populations. The systems approach provides for the establishment of areas that are free of the three fruit flies or the use of trapping for those fruit flies; if trapping is conducted, the NPPO of Peru would also have to verify that the growers are complying with the trapping requirements and would have to certify that each place of production has effective fruit fly trapping programs. Any personnel conducting trapping and pest surveys would have to be trained and supervised by the NPPO of Peru. APHIS would monitor the places of production if necessary.

Under paragraph (b)(2), in addition to conducting fruit inspections at the packinghouses, the NPPO of Peru would be required to monitor packinghouse operations to verify that the packinghouses are complying with the packinghouse requirements for fruit origin, pest exclusion, cleaning, safeguarding, and identification that are described later in this document.

Under paragraph (b)(3), if the NPPO of Peru finds that a place of production or a packinghouse is not complying with the proposed regulations, no fruit from the place of production or packinghouse would be eligible for export to the United States until APHIS and the NPPO of Peru conduct an investigation and appropriate remedial actions have been implemented.

Paragraph (b)(4) would require the NPPO of Peru to retain all forms and documents related to export program activities in groves and packinghouses for at least 1 year and, as requested, provide them to APHIS for review. Such forms and documents would include (but would not necessarily be limited to)

fruit fly trapping records, avocado seed moth survey records, inspection records, and treatment records.

Grove Sanitation

Under paragraph (c) of proposed § 319.56–49, avocado fruit that has fallen from the trees would have to be removed from each place of production at least once every 7 days, starting 2 months before harvest and continuing to the end of harvest. This procedure would reduce the amount of material in the groves that could serve as potential host material for insect pests.

Fruit that has fallen from avocado trees to the ground may be damaged and thus more susceptible to infestation. Therefore, proposed paragraph (c) would not allow fallen avocado fruit to be included in field containers of fruit brought to the packinghouse to be packed for export.

Mitigation Measures for A. fraterculus and A. striata

Paragraph (d) of proposed § 319.56–49 would provide two options for mitigating the risk associated with *A. fraterculus* and *A. striata* in avocados from Peru: Establishment of an area free of *A. fraterculus* and *A. striata* or trapping to demonstrate that places of production have a low prevalence of *A. fraterculus* and *A. striata*.

Peru currently does not have any areas that APHIS considers to be free of *A. fraterculus* and *A. striata*. However, the NPPO of Peru has indicated its intention to establish areas within Peru that are free of *A. fraterculus* and *A. striata* in the future.

Section 319.56–5 sets out specific requirements for determination that an area is a pest-free area. Paragraph (a) of § 319.56–5 states that determinations of pest-free areas be made in accordance with International Standards for Phytosanitary Measures (ISPM) No. 4, which is incorporated by reference in § 300.5. ISPM No. 4 sets out three main criteria for recognition of a pest-free area:

- Systems to establish freedom;
- Phytosanitary measures to maintain freedom; and
- Checks to verify freedom has been maintained.

Paragraph (b) of § 319.56–5 requires that APHIS approve the survey protocol used to determine and maintain pest-free status, as well as protocols for actions to be taken upon detection of a pest. It also indicates that pest-free areas are subject to audit by APHIS to verify their status.

If avocados were produced in an area designated by APHIS as free of *A. fraterculus* and *A. striata* in accordance with § 319.56–5, no further mitigations for those fruit flies would be necessary for fruit produced in that area. Therefore, proposed paragraph (d)(1) would provide as an option for mitigating *A. fraterculus* and *A. striata* that the avocados are produced in a place of production located in an area that is designated as free of *A. fraterculus* and *A. striata* in accordance with § 319.56–5.

If we were to determine that an area in Peru is free of *A. fraterculus* and *A. striata*, the general requirements for fruits and vegetables imported from pest-free areas in paragraph (e) of § 319.56–5 would be addressed in other parts of the proposed systems approach in § 319.56–49. Specifically:

- The traceability requirements in paragraph (h)(5) of proposed § 319.56–49 fulfill the requirements in paragraph (e)(1) of § 319.56–5;
- The phytosanitary certification requirement in paragraph (j) of proposed § 319.56–49 fulfills the certification requirement in paragraph (e)(2) of § 319.56–5; and
- The safeguarding requirements in paragraphs (g) and (h)(4) of proposed § 319.56–49 fulfill the safeguarding requirement in paragraph (e)(3) of § 319.56–5. These requirements are discussed in greater detail later in this document.

Paragraph (d)(2) of proposed § 319.56–49 would provide for the use of trapping to demonstrate that registered places of production have a low prevalence of *A. fraterculus* and *A. striata*. Although the PRA has determined that *A. fraterculus* and *A. striata* are both potentially pests of Hass avocados from Peru, Hass avocados are known to be poor hosts for *Anastrepha* spp. fruit flies in general. However, the risk that these fruit flies will infest Hass avocados increases if their population is high in areas where avocados are produced. Trapping to demonstrate an area of low pest prevalence would therefore be an appropriate mitigation for these two fruit flies.

Beginning at least 1 year before harvest begins and continuing through the end of the harvest, trapping would have to be conducted in registered places of production with at least 1 trap per 0.2 square kilometers (km^2) to demonstrate that the places of production have a low prevalence of *A. fraterculus* and *A. striata*. APHIS-approved traps baited with APHIS-approved plugs would have to be used and serviced at least once every 2 weeks.

During the trapping, when traps are serviced, if *A. fraterculus* and *A. striata* are trapped at a particular place of production at cumulative levels above 0.7 flies per trap per day, pesticide bait treatments would have to be applied in the affected place of production in order for the place of production to remain eligible to export avocados to the United States. The NPPO of Peru would have to keep records of fruit fly detections for each trap, update the records each time the traps are checked, and make the records available to APHIS inspectors upon request.

Mitigation Measures for Medfly

Paragraph (e) of proposed § 319.56–48 would provide three options for mitigating the risk associated with Medfly in avocados from Peru: Establishment of an area free of Medfly, trapping to demonstrate that places of production are free of Medfly, or treatment.

Similar to proposed paragraph (d)(1), proposed paragraph (e)(1) would provide as an option for Medfly that the avocados are produced in a place of production located in an area that is designated as free of Medfly in accordance with § 319.56–5. Peru currently does not have any areas that APHIS considers to be free of Medfly. However, the NPPO of Peru has indicated its intention to establish areas within Peru that are free of Medfly in the future.

Hass avocados are a better host for Medfly than they are for *A. fraterculus* and *A. striata*. For that reason, paragraph (e)(2) of proposed § 319.56–49 would provide for the use of trapping to demonstrate that registered places of production are free of Medfly.

Beginning at least 1 year before harvest begins and continuing through the end of the harvest, trapping would have to be conducted in registered places of production to demonstrate that the places of production are free of Medfly. There would have to be at least 2 traps per km^2 in commercial production areas. APHIS-approved traps baited with APHIS-approved plugs would have to be used and serviced at least once every 2 weeks.

During the trapping, when traps are serviced, if any Medfly are found, 10 additional traps would have to be deployed in a 0.5-km^2 area immediately surrounding all traps where Medfly was found to determine whether a reproducing population is established. If any additional Medfly are found within 30 days of the first detection, the affected place of production would be ineligible to export avocados without treatment for Medfly until the source of the infestation is identified and the infestation is eradicated. APHIS would have to concur with the determination

that the infestation has been eradicated. The NPPO of Peru would have to keep records of fruit fly detections for each trap, update the records each time the traps are checked, and make the records available to APHIS inspectors upon request.

If the avocados were not produced in an area free of Medfly or in a place of production free of Medfly, or if a reproducing population of Medfly is detected at a place of production and the infestation has not yet been eradicated, avocados from that place of production would only be allowed to be exported to the United States if they are treated in accordance with 7 CFR part 305. (We are proposing to approve five treatments for Medfly in avocados from Peru. This is discussed in further detail later in this document under the heading ''Addition of Treatments for Medfly in Avocados from Peru.'')

Surveys for the Avocado Seed Moth

Paragraph (f) of proposed § 319.56–49 would require surveys to demonstrate that registered places of production are free of the avocado seed moth. Specifically, Peruvian departamentos [2] in which avocados are grown for export to the United States would have to be surveyed by the NPPO of Peru at least once annually, no more than 2 months before harvest begins, and found to be free from infestation by the avocado seed moth. An annual survey is appropriate for the avocado seed moth because the pest has limited mobility; the results of a survey conducted no more than 2 months before harvest would indicate freedom from the avocado seed moth for the entire harvest period. APHIS would have to approve the survey protocol used to determine and maintain pest-free status and the actions to be performed if the avocado seed moth is detected.

Surveys would have to include representative areas from all parts of each registered place of production in each departamento. The NPPO of Peru would have to cut and inspect a biometric sample of fruit at a rate determined by APHIS. We expect that the biometric sample would include about 300 fruit from each place of production. Fruit sampled would have to be either from the upper half of the tree or from the ground. Sampled fruit would have to be cut and examined for the presence of eggs and larvae of the avocado seed moth in the pulp or seed and for the presence of eggs in the pedicel.

If one or more avocado seed moths is detected in the annual survey, the affected place of production would be immediately suspended from the export program until appropriate measures to reestablish pest freedom, agreed upon by the NPPO of Peru and APHIS, have been taken. These measures could include further delimiting surveys, appropriate pesticide treatments, or removal of infested host material. The NPPO of Peru would have to keep records of the avocado seed moth detections for each orchard, update the records each time the orchards are surveyed, and make the records available to APHIS inspectors upon request. The records would have to be maintained for at least 1 year after the beginning of the harvest, in order to ensure that the records of the previous year's survey are available when conducting a survey.

Harvesting Requirements

Paragraph (g) of proposed § 319.56–49 sets out requirements for harvesting. Harvested avocados would have to be placed in field cartons or containers that are marked with the official registration number of the place of production. The place of production where the avocados were grown would have to remain identifiable when the fruit leaves the grove, at the packinghouse, and throughout the export process. These requirements would ensure that APHIS and the NPPO of Peru could identify the place of production where the avocados were produced if inspectors find quarantine pests in the fruit either before export or at the port of entry.

We would require the fruit to be moved to a registered packinghouse within 3 hours of harvest or to be protected from fruit fly infestation until moved. (Because of its low mobility, the avocado seed moth is not expected to infest picked avocados in places of production that have been surveyed and found to be free of that pest.) The fruit would have to be safeguarded by an insect-proof screen or plastic tarpaulin while in transit to the packinghouse and while awaiting packing. These requirements would prevent the fruit from being infested by fruit flies between harvest and packing.

Packinghouse Requirements

We are proposing several requirements for fruit origin and packinghouse activities, which would be contained in paragraph (h) of proposed § 319.56–49.

Paragraph (h)(1) would require registered packinghouses to accept only avocados that are from registered places of production and that are produced in accordance with the requirements of the systems approach during the time they are in use for packing avocados for export to the United States.

Paragraph (h)(2) would require avocados to be packed within 24 hours of harvest in an insect-exclusionary packinghouse. All openings to the outside of the packinghouse would have to be covered by screening with openings of not more than 1.6 mm or by some other barrier that prevents pests from entering. Screening with openings of not more than 1.6 mm excludes fruit flies. The packinghouse would have to have double doors at the entrance to the facility and at the interior entrance to the area where the avocados are packed. These proposed requirements are designed to exclude fruit flies from the packinghouse.

Paragraph (h)(3) would require all avocados to be cleaned of all plant debris before packing. This procedure would ensure that the fruit alone is exported to the United States; other parts of the avocado tree may harbor pests other than the quarantine pests identified earlier. As noted earlier, the cleaning process also helps to remove *C. viridis* and *F. malvastra.*

Paragraph (h)(4) would require fruit to be packed in insect-proof packaging, or covered with insect-proof mesh or a plastic tarpaulin, for transport to the United States, to prevent fruit fly infestation after the fruit is packed. These safeguards would have to remain intact until arrival in the United States.

Paragraph (h)(5) would require shipping documents accompanying consignments of avocados from Peru that are exported to the United States to include the official registration number of the place of production at which the avocados were grown and to identify the packing shed or sheds in which the fruit was processed and packed. This identification would have to be maintained until the fruit is released for entry into the United States. These requirements would ensure that APHIS and the NPPO of Peru could identify the packinghouse at which the fruit was packed if inspectors find quarantine pests in the fruit either before export or at the port of entry.

Inspection by the NPPO of Peru

To ensure that the mitigations required in the systems approach are effective at producing fruit free of the targeted quarantine pests, paragraph (i) of proposed § 319.56–49 would require inspectors from the NPPO of Peru to inspect a biometric sample from each place of production at a rate to be

[2] In Peru, the departamento is the first level of political subdivision within the country, similar to the U.S. State. However, because Peru is about five-sixths of the size of Alaska and there are 25 departamentos, a typical departamento is smaller than most States.

determined by APHIS. The inspectors would have to visually inspect fruit from each place of production for all the quarantine pests. The inspectors would also have to cut fruit to inspect for the avocado seed moth and to inspect for *A. fraterculus*, *A. striata*, and Medfly if the avocados did not originate from an area free of those fruit flies.

C. viridis and *F. malvastra* are both external pests that can be detected by inspection. We commonly use phytosanitary inspection, along with requiring the use of commercial production practices, to mitigate the risk associated with *C. viridis* and with mealybug pests. Inspection of cut fruit for *A. fraterculus*, *A. striata*, Medfly, and the avocado seed moth is effective at detecting these internal feeders. We have cut fruit to detect fruit flies in programs such as the program for the importation of clementines from Spain; such cutting is required in the regulations at § 319.56–34(f). Similarly, the regulations governing the importation of Hass avocados from Mexico in § 319.56–30(c)(3)(iv) require fruit cutting to detect avocado pests including fruit flies and the avocado seed moth. We have determined that inspection can serve as an effective mitigation for the risk associated with these pests in avocados exported from Peru as well.

If any quarantine pests are detected in this inspection, the place of production where the infested avocados were grown would immediately be suspended from the export program until an investigation has been conducted by APHIS and the NPPO of Peru and appropriate mitigations have been implemented.

If Medfly is detected, avocados from the place of production where the infested avocados were produced would be allowed to be imported into the United States only if treated with an approved treatment for Medfly in accordance with 7 CFR part 305.

Phytosanitary Certificate

To certify that the Hass avocados from Peru have been grown and packed in accordance with the requirements of proposed § 319.56–49, proposed paragraph (j) would require each consignment of Hass avocados imported from Peru into the United States to be accompanied by a phytosanitary certificate issued by the NPPO of Peru with an additional declaration stating that the avocados in the consignment were grown, packed, and inspected and found to be free of pests in accordance with the requirements of proposed § 319.56–49. In addition:

- If the avocados were produced in an area free of *A. fraterculus* and *A. striata*, the phytosanitary certificate would have to state that the avocados in the consignment were produced in an area designated as free of *A. fraterculus* and *A. striata* in accordance with 7 CFR 319.56–5.
- If the avocados were produced in an area free of Medfly, the phytosanitary certificate would have to state that the avocados in the consignment were produced in an area designated as free of Medfly in accordance with 7 CFR 319.56–5.
- If the avocados were treated for Medfly prior to export, the phytosanitary certificate would have to state that the avocados in the consignment were treated for Medfly in accordance with 7 CFR part 305.

Addition of Treatments for Medfly in Avocados From Peru

The regulations in 7 CFR part 305 set out standards and schedules for treatments required in 7 CFR parts 301, 318, and 319 to prevent the introduction or dissemination of plant pests or noxious weeds into or through the United States through the importation or movement of fruits, vegetables, and other articles. Section 305.2 lists approved treatments; paragraph (h)(2)(i) lists approved treatments for imported fruits and vegetables, and paragraph (h)(2)(ii) lists approved treatments for fruits and vegetables moved interstate.

Five treatments are currently listed as approved treatments for Medfly in avocados:

- Methyl bromide fumigation treatment schedule MB T101–c–1, approved for treating Medfly in avocados imported from Israel and from the Philippines;
- Methyl bromide fumigation followed by cold treatment schedules MB&CT T108–a–1, MB&CT T108–a–2, and MB&CT T108–a–3, approved for treating Medfly in avocados imported from Chile and avocados moved interstate from areas quarantined for Medfly;
- Cold treatment schedule T107–a, approved for avocados moved interstate from areas quarantined for Medfly.

Because there are no differences between the avocados grown in Peru and the avocados grown in the United States or the other countries listed above that would affect the efficacy of the treatments, we have determined that these treatments would be effective for treating Medfly in avocados imported from Peru as well. Therefore, we are proposing to list MB T101–c–1, MB&CT T108–a–1, MB&CT T108–a–2, MB&CT T108–a–3, and CT T107–a as approved treatments for Medfly in avocados from Peru in paragraph (h)(2)(i) of § 305.2.

Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been reviewed under Executive Order 12866. The proposed rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with 5 U.S.C. 603, we have performed an initial regulatory flexibility analysis, which is set out below, regarding the economic effects of this proposed rule on small entities. Based on the information we have, there is no reason to conclude that adoption of this proposed rule would result in any significant economic effect on a substantial number of small entities. However, we do not currently have all of the data necessary for a comprehensive analysis of the effects of this proposed rule on small entities. Therefore, we are inviting comments on potential effects. In particular, we are interested in determining the number and kind of small entities that may incur benefits or costs from the implementation of this proposed rule.

The NPPO of Peru has requested that APHIS authorize market access for commercial shipments of fresh Hass avocados into the continental United States for domestic consumption. APHIS is proposing to grant this request if Peru produces the Hass avocados in accordance with a systems approach that would include registration and monitoring of places of production and packinghouses; grove sanitation; pest-free areas or trapping for fruit flies; surveys for the avocado seed moth; and inspection for quarantine pests by Peru's NPPO. Hass avocados from Peru would also be required to be accompanied by a phytosanitary certificate with an additional declaration stating that the avocados have been inspected for quarantine pests and were grown and packed in accordance with the proposed requirements. These mitigations would allow for the importation of Hass avocados from Peru into the United States while providing protection against the introduction of quarantine pests. Application of the mitigation measures in granting Peru's request is consistent with World Trade Organization agreements that sanitary and phytosanitary regulatory restrictions should be based on scientific evidence and applied only to the extent necessary to protect human, animal, and plant health.

This analysis focuses on the potential economic impacts of allowing fresh Hass avocado imports from Peru. Expected benefits and costs are examined in accordance with Executive Order 12866. Expected economic impacts for small entities are also evaluated, as required by the Regulatory Flexibility Act. Our analysis indicates that, while producer revenues would be negatively affected, the benefits of the proposed rule would exceed costs overall. The study considers expected price and welfare changes due to projected annual imports of 19,000 metric tons of fresh Hass avocados from Peru.

The United States is the world's leading importer of all fresh Hass avocados, with imports between 60 and 75 percent of total world exports annually. Japan and Canada rank a distant second and third with combined imports of 18 to 20 percent annually. The United States imports primarily from Mexico and Chile. Mexico and Chile account for approximately 50 and 30 percent, respectively.[3] The United States exports less than 1.5 percent of its production; whereas U.S. consumption is more than double production. California is the largest U.S. producer of avocados, accounting for approximately 86 percent of all production and nearly all Hass avocado production. Peru has emerged as a major exporter of Hass avocados on the world market in recent years, accounting for approximately 18 percent of world exports. In Peru, the Hass avocado harvesting season occurs between May and September; whereas the California avocado marketing season is perennial.

Analytical Approach, the Baseline, and Modeling Assumptions

In this section, we describe the economic model used to compute expected impacts of the proposed rule on producers and consumers of fresh Hass avocados, as well as the assumptions of the analysis, including the baseline price and quantities, projected imports from Peru, the price elasticities of demand and supply, and possible levels of displacement of fresh Hass avocado imports from other countries by projected imports from Peru.

The Baseline Analysis System (BAS) Model

The Baseline Analysis System (BAS) model is a non-spatial partial equilibrium welfare model.[4] The BAS model can be applied to evaluate how market prices and quantities adjust to changes in policy, and how producers and consumers are thereby affected by implementation of the policy changes.

Our analysis is non-spatial in that the price and quantity effects obtained from the model are assumed to be average effects across geographically separated markets. Partial equilibrium means that the model results are based on maintaining a supply-and-demand equilibrium in a limited portion of an overall economy. Economic sectors not explicitly included in the model are assumed to have a negligible influence on the model results. A partial equilibrium analysis is appropriate because the proposed rule is specific to the U.S. fresh Hass avocado market, and is therefore expected to have only limited effects on other sectors of the economy. Avocados are not close substitutes for other fruits.

Expected effects of the proposed rule are described in terms of welfare impacts, as reflected in calculated changes in consumer and producer surplus. Consumer surplus is the difference between what the consumer pays for a unit of a good or service and the maximum price that the consumer would be willing to pay for that unit. Producer surplus is the difference between the price a producer is paid for supplying a unit of a good or service and the minimum price that the producer would be willing to accept to supply that unit.

The consumer and producer surplus equations in the model are based on the assumption that demand and supply functions are approximately linear near the initial equilibrium point. For small shifts, this assumption results in reasonably accurate measures of consumer and producer surplus changes. Parallel shifts in the demand and supply functions are assumed. In addition to domestic demand and supply functions, an import supply function is included in the model to account for assumed changes in imports.

Baseline for Fresh Hass Avocados

The model's baseline represents the current U.S. fresh Hass avocado market, in terms of production, consumption, import, and export quantities; price; and own-price elasticities of demand and supply. Price elasticities describe the responsiveness of sellers and buyers to price changes. Table 1 reports the baseline data used in calculating the welfare impacts of importing fresh Hass avocados from Peru. Baseline quantities are 5-year averages, for the seasons 2002–03 through 2006–07, of U.S. fresh Hass avocado production, consumption, imports, and exports. The baseline price is the average import price for fresh Hass avocados on the domestic market over the same 5-year period, inflated to 2008 dollars using the gross domestic product deflator. Domestic demand for fresh Hass avocados is equivalent to consumption, or production plus imports minus exports. Domestic supply is measured as production minus exports.

TABLE 1—U.S. BASELINE DATA FOR FRESH HASS AVOCADO

[2002–03 through 2006–07 averages, metric tons]

Production[1]	174,869
Imports[2]	202,512
Exports[2]	2,616
Consumption[3]	374,766
Price per metric ton[2]	$1,410

[1] *Source:* California Avocado Commission (CAC) Annual Report 2006–07.
[2] *Source:* World Trade Atlas data.
[3] Calculated as production plus imports minus exports.

For this analysis, we use short-run and long-run supply elasticities for Hass avocados of 0.15 and 1.50, respectively, and a demand elasticity of −1.20. These elasticities are taken from Hoddle, *et al.* (2003). This study utilized data from Carman and Craft (1998) and techniques developed by Armington (1969) to obtain the own-price elasticity of demand. The more elastic supply in the longer run reflects producers' greater ability to adjust to changes in price over longer periods of time.

The Peru Avocado Growers Association estimates that 19,000 metric tons of fresh Hass avocados would be exported annually to the United States. It is likely that, given domestic demand constraints, a percentage of fresh Hass avocado imports from other sources would be displaced by these shipments. For the short- and long-term sets of

[3] Global Trade Atlas data.

[4] A complete description of the model is provided in: Forsythe, K.W., ''An Economic Model for Routine Analysis of the Welfare Effects of Regulatory Changes.'' V3.00. U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Veterinary Services, Centers for Epidemiology and Animal Health. April 20, 2005 (draft). *http://www.aphis.usda.gov/peer_review/content/printable_version/bas_model_econOnly_apr20.pdf.*

The BAS economic model is based on methodology described in the following studies: Ebel, E.D., R.H. Hornbaker, and C.H. Nelson, ''Welfare Effects of the National Pseudorabies Eradication Program.'' *Amer. J. Agr. Econ.* 74(August 1992):638–45; Forsythe, K.W., and B.A. Corso, ''Welfare Effects of the National Pseudorabies Eradication Program: Comment.'' *Amer. J. Agr. Econ.* 76(November 1994):968–71; and Lichtenberg, E., D.D. Parker, and D. Zilberman, ''Marginal Analysis of Welfare Cost of Environmental Policies: The Case of Pesticide Regulation.'' *Amer. J. Agr. Econ.* 70(November 1988):867–74.

demand and supply elasticities, we model the welfare impacts assuming three different levels of displacement of fresh Hass avocado imports from other sources: No displacement, 11 percent of imports from Peru would displace imports from elsewhere, and 24 percent of imports from Peru would displace imports from elsewhere.

The 11 and 24 percent displacement levels are derived from the projected level of imports from Peru (19,000 metric tons), excess supply and demand elasticities for the United States (the same as those estimated by Hoddle, *et al.*), and market-clearing conditions of trade that include the excess supply of Hass avocados from Peru.[5]

As a measure of the sensitivity of the price and welfare effects to the projected level of imports from Peru, we calculate impacts assuming import levels would be 50 percent less or 50 percent greater (i.e., 9,500 metric tons or 28,500 metric tons of fresh Hass avocados imported yearly from Peru) than the projected 19,000 metric tons. Table 2 reports the net increases in U.S. Hass avocado imports for the three displacement scenarios and the three modeled levels of imports from Peru.

TABLE 2—NET INCREASE IN U.S. HASS AVOCADO IMPORTS, BASED ON PROJECTED IMPORT LEVELS OF FRESH HASS AVOCADOS FROM PERU AND DISPLACEMENT SCENARIOS

Percentage of imports from Peru assumed to displace other imports	Net increase in U.S. avocado imports		
	50 percent less than projected imports	Projected imports	50 percent more than projected imports
	MT		
0	9,500	19,000	28,500
11	8,455	16,910	25,365
24	7,220	14,400	21,660

Expected Costs and Benefits

In this section we report the results of the quantitative analysis. Price impacts and welfare effects for domestic producers and consumers of fresh Hass avocados are presented. We evaluate the sensitivity of the results to fresh avocado import levels different from those projected by comparing the effects of importing 50 percent more or 50 percent less from Peru than the projected 19,000 metric tons.

Model Results

Based on data averaged over 5 seasons, price changes and welfare effects of the proposed rule are summarized in tables 3 through 5 for projected fresh avocado imports from Peru of 19,000 metric tons annually, at 0, 3, and 7 percent discount rates for each set of elasticities. As expected, the price decline is largest when there is zero displacement, and demand and supply are more inelastic.

With a supply elasticity of 0.15 and a demand elasticity of −1.20, the price is calculated to decline by 4 percent when 19,000 metric tons of fresh Hass avocados are imported annually from Peru and there is no displacement of other imports. Undiscounted producer welfare losses under this set of elasticities and zero displacement total about $9.7 million, with consumer welfare gains of approximately $21.6 million and a net welfare gain of nearly $12 million.

When we assume that 24 percent of imports from Peru would displace imports from other sources, the same elasticities of demand and supply generate a price decline of 3.04 percent, undiscounted producer welfare losses of approximately $7.4 million, consumer welfare gains of $16.3 million, and a net welfare gain of $8.9 million. We expect the displacement percentage to lie between zero and 24 percent. The impacts for producers and consumers are also calculated assuming 3 and 7 percent rates of discount. Since the welfare effects are discounted only 1 year, from 2009, the presumed year of implementation, to the base year of 2008, the values when discounted at 3 and 7 percent are very similar to the undiscounted values. As expected, the net changes in welfare show small declines with increases in the discount rate.

In the more intermediate run, when the responsiveness of consumers is not as inelastic, price decline is smaller. Given a supply elasticity of 1.50 and a demand elasticity of −1.20, the price is calculated to decline by 2.7 percent with 19,000 metric tons of fresh Hass avocados imported annually from Peru. Undiscounted producer welfare losses under this scenario total about $6.4 million, with consumer welfare gains of approximately $14 million for a net welfare gain of about $8 million. Assuming 24 percent displacement and the same elasticities of demand and supply, the price is calculated to decline by about 2 percent with undiscounted producer welfare losses of nearly $4.9 million, consumer welfare gains of $10.9 million, and net welfare gains of $6 million.

The higher the level of displacement of imports from other countries, the smaller the price change and the smaller the welfare losses for producers and welfare gains for consumers. The extent to which displacement occurs is a critical factor affecting the size of potential impacts of the rule. Also, welfare gains for consumers and welfare losses for producers can be expected to be larger in the short run where supply is inelastic. Regardless of the percentage of displacement, the rate of discount, or the price elasticity of demand and supply, the benefits of the proposed rule to allow a projected 19,000 metric tons of fresh Hass avocados to be imported into the United States from Peru would exceed the costs in the long run.

[5] Displacement is calculated as a function of the excess supply of avocados from Peru and the excess demand for avocados by the United States, where displacement is equal to $1-\varepsilon \div (\eta-\varepsilon)$, ε represents the excess supply elasticity and η represents the excess demand elasticity. This representation is derived from the trading relationship by taking the logarithmic differential of the excess supply equation and solving for the logarithmic change in excess supply. Trade creation is expressed as the change in excess supply divided by the change in Peruvian avocado imports. Trade displacement is the remaining portion of Peruvian imports and is calculated as one minus trade creation.

TABLE 3—ONE-YEAR PRICE AND WELFARE EFFECTS FOR PROJECTED ANNUAL IMPORTS OF 19,000 METRIC TONS OF FRESH HASS AVOCADOS FROM PERU, DISCOUNTED AT 0 PERCENT

Demand and supply elasticities	Percentage of imports from Peru that displace other imports	Price change (percent)	Change in consumer welfare	Change in producer welfare	Net welfare change
			$1,000		
D −1.20, S 0.15	0	−4.00	21,618	−9,675	11,944
D −1.20, S 0.15	11	−3.56	19,191	−8,613	10,577
D −1.20, S 0.15	24	−3.04	16,337	−7,358	8,979
D −1.20, S 1.50	0	−2.68	14,407	−6,386	8,021
D −1.20, S 1.50	11	−2.39	12,800	−5,696	7,104
D −1.20, S 1.50	24	−2.04	10,908	−4,877	6,031

TABLE 4—ONE-YEAR PRICE AND WELFARE EFFECTS FOR PROJECTED ANNUAL IMPORTS OF 19,000 METRIC TONS OF FRESH HASS AVOCADOS FROM PERU, DISCOUNTED AT 3 PERCENT

Demand and supply elasticities	Percentage of imports from Peru that displace other imports	Price change (percent)	Change in consumer welfare	Change in producer welfare	Net welfare change
			$1,000		
D −1.20, S 0.15	0	−4.00	20,988	−9,393	11,596
D −1.20, S 0.15	11	−3.56	18,632	−8,362	10,269
D −1.20, S 0.15	24	−3.04	15,862	−7,144	8,718
D −1.20, S 1.50	0	−2.68	13,987	−6,200	7,787
D −1.20, S 1.50	11	−2.39	12,427	−5,530	6,897
D −1.20, S 1.50	24	−2.04	10,590	−4,735	5,855

TABLE 5—ONE-YEAR PRICE AND WELFARE EFFECTS FOR PROJECTED ANNUAL IMPORTS OF 19,000 METRIC TONS OF FRESH HASS AVOCADOS FROM PERU, DISCOUNTED AT 7 PERCENT

Demand and supply elasticities	Percentage of imports from Peru that displace other imports	Price change (percent)	Change in consumer welfare	Change in producer welfare	Net welfare change
			$1,000		
D −1.20, S 0.15	0	−4.00	20,204	−9,042	11,162
D −1.20, S 0.15	11	−3.56	17,935	−8,050	9,885
D −1.20, S 0.15	24	−3.04	15,269	−6,877	8,392
D −1.20, S 1.50	0	−2.68	13,465	−5,968	7,497
D −1.20, S 1.50	11	−2.39	11,963	−5,324	6,639
D −1.20, S 1.50	24	−2.04	10,194	−4,558	5,636

As indicated, in addition to considering the effects of three possible levels of displacement of fresh avocado imports from other sources, we analyzed the sensitivity of the results to changes in the projected quantity of fresh Hass avocados imported from Peru. We calculated the price and welfare effects assuming the possibility that avocado imports from Peru are 50 percent less or 50 percent greater than the 19,000 metric tons projected by Peruvian exporters.

Fresh avocado imports from Peru of 19,000 metric tons (and zero displacement of fresh avocado imports from other countries) would increase U.S. annual imports by approximately 9 percent, given the 5-year average of approximately 202,512 metric tons for the seasons 2002–03 through 2006–07. Imports of Hass avocados from Peru that are 50 percent more than is projected would increase the import supply by as much as 14 percent, whereas imports of Hass avocados from Peru that are 50 percent less than is projected by Peruvian exporters would increase the import supply not quite 5 percent. The results of the sensitivity analysis, as reported in table 6, assume that the annual quantity imported is 50 percent less (9,500 metric tons) or 50 percent more (28,500 metric tons) than the projected level of imports for the two pairs of demand and supply elasticities, three displacement scenarios, and applying a 3 percent rate of discount. The ranges for the changes in price and for the welfare effects are calculated for each of the three displacement levels. Again, the change in price is greatest when there is zero displacement in the short run where supply is more inelastic than the long run.

TABLE 6—SENSITIVITY ANALYSIS FOR PROJECTED U.S. IMPORTS OF FRESH HASS AVOCADOS FROM PERU

Demand and supply elasticities	Percentage of imports from Peru that displace other imports	Price change (percent)	Change in consumer welfare	Change in producer welfare	Net welfare change
			Million Dollars		
D −1.20, S 0.15	0	−2.0 to −6.0	10.7 to 31.8	−4.7 to −14.1	5.7 to 17.8
D −1.20, S 0.15	11	−1.8 to −5.3	9.2 to 28.2	−4.2 to −12.5	5.0 to 15.7
D −1.20, S 0.15	24	−1.5 to −4.6	7.9 to 24.0	−3.6 to −10.7	4.3 to 13.3
D −1.20, S 1.50	0	−1.3 to −4.0	6.9 to 21.1	−3.1 to −9.2	3.8 to 11.9
D −1.20, S 1.50	11	−1.2 to −3.6	6.2 to 18.7	−2.8 to −8.2	3.4 to 10.6
D −1.20, S 1.50	24	−1.0 to −3.1	5.3 to 16.0	−2.4 to −7.0	2.9 to 8.9

Note: Net welfare gains may not sum due to rounding. Only the welfare effects when discounted at 3 percent are presented, since the results are much the same when discount rates of 0 and 7 percent are used.

The price of fresh Hass avocados is calculated to decline by 6 percent if 28,500 metric tons of fresh Hass avocados were imported annually from Peru, there was no displacement of imports from other countries, and the demand and supply elasticities were −1.20 and 0.15; assuming an import level of 9,500 metric tons, no displacement, and the same elasticities yields a decrease in price of 2 percent.[6] Without displacement, prices were estimated to fall between 1.3 and 4 percent as producers adjust to market changes.

When we assume 24 percent displacement, given the same elasticities of demand and supply, price is calculated to decline between 1.5 percent (imports 50 percent less than projected) and 4.6 percent (imports 50 percent more than projected), with producer welfare losses ranging from $3.6 million to $10.7 million, consumer welfare gains from $7.9 million to $24 million, and net welfare gains from $4.3 million to $13.3 million.

In the long run, as implied by a supply elasticity of 1.50 and a demand elasticity of −1.20, the price is calculated to decline between 1 percent (imports 50 percent less than projected) and 3 percent (imports 50 percent more than projected), assuming 24 percent displacement of imports from other countries. Producer welfare losses under this scenario range from $2.4 million to $7 million, with consumer welfare gains ranging from $5.3 million to $16 million, for a net welfare gain of between $2.9 million and $8.9 million.

Given the linearity of the BAS model, changes in welfare are proportional to the assumed levels of imports from Peru. The largest annual net welfare gains reported in the sensitivity analysis are $17.8 million, with producer welfare losses of $14.1 million and consumer welfare gains of $31.9 million. These welfare impacts are based on fresh avocado imports from Peru totaling 28,500 metric tons and the unlikely possibility that none of these imports would displace fresh avocado imports from other countries. More reasonably, some portion of the imports from Peru would displace existing imports from foreign sources, and price and welfare effects of the rule for U.S. entities would be thereby moderated.

Benefit and Cost Conclusion

According to the Peru Avocado Growers Association, exporters expect to ship approximately 19,000 metric tons of fresh Hass avocados per year from Peru to the United States if the proposed rule is finalized. The projected imports would be roughly 5 percent of U.S. fresh avocado consumption and 11 percent of U.S. fresh avocado production. It is likely that at least a portion of the projected imports from Peru would displace imports from other foreign sources when fresh avocado supplies are low and demand is high. If no displacement were to occur, projected fresh avocado imports from Peru would represent an increase in fresh avocado imports of 9 percent. The extent to which displacement occurs is a critical factor affecting the size of potential impacts of the proposed rule.

In the analysis of expected price and welfare impacts, we examined effects of the projected level of fresh avocado imports from Peru if none, 11 percent, or 24 percent of the imports were to displace fresh avocado imports from other countries. We compared the price and welfare effects for two sets of demand and supply elasticities and quantified the welfare effects when not discounted as well as when they are discounted at 3 and 7 percent. The higher the level of displacement of imports from other countries, the smaller the price decline, and the smaller the welfare losses for producers and welfare gains for consumers.

In addition to considering the effects for three possible levels of displacement of fresh avocado imports from other sources, we analyzed the sensitivity of the results to different quantities of fresh Hass avocados imported from Peru. We calculated the price and welfare effects assuming the avocado imports to be 50 percent less or 50 percent greater than the 19,000 metric tons projected by Peru.

Given the linearity of the model used to assess welfare impacts, this sensitivity analysis yielded changes in welfare that are proportional to the assumed levels of imports. Reasonably, some portion of the imports from Peru would displace existing imports, and price and welfare effects of the rule for U.S. entities would be thereby moderated. The results of the sensitivity analysis indicate that consumers may be positively affected and U.S. producers may be negatively affected by a decline in market prices ranging between 1 percent and 6 percent, depending on the price elasticities of demand and supply and displacement ranging from 11 to 24 percent of fresh avocado imports from Peru. Net welfare gains for these same levels of displacement range from $2.9 million to $17.8 million, when discounted 3 percent. In all of the modeled scenarios, consumer gains resulting from the proposed rule are found to exceed U.S. producer losses. Nevertheless, producer prices are estimated to continue to decline in the long run, which may continue to

[6] The changes in welfare discussed in the remainder of this section have been computed using a discount rate of 3 percent.

negatively impact producer revenues. As producer receipts decline, so shall revenues for avocado handlers.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act requires that agencies consider the economic impact of rule changes on small businesses, organizations, and governmental jurisdictions. Section 603 of the Act requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) describing the expected impact of proposed rules on small entities. Sections 603(b) and 603(c) of the Act specify the content of an IRFA. In this section, we address these IRFA requirements for this proposed rule.

Reasons for Action

The national plant protection organization (NPPO) of Peru has requested that APHIS allow the importation of fresh Hass avocados into the United States for domestic consumption. The current fruits and vegetables regulations (7 CFR 319.56–1 through 319.56–48) do not authorize the importation of fresh Hass avocados from Peru. In response to this request, APHIS is proposing to allow the importation of commercial shipments of fresh Hass avocados from Peru under a systems approach to address the risks presented by various pests. The systems approach is described earlier in this document.

The proposed rule is consistent with World Trade Organization agreements that sanitary and phytosanitary regulatory restrictions should be based on scientific evidence and applied only to the extent necessary to protect human, animal, and plant health.

Objectives and Legal Basis for Rule

The objective of the proposed rule is to amend the regulations under ''Subpart—Fruits and Vegetables'' to allow the importation of commercial consignments of fresh Hass avocados from Peru under a combination of mitigation measures to address the risk of pest introduction.

The regulations in ''Subpart—Fruits and Vegetables'' (§§ 319.56–1 through 319.56–48) govern the importation of fruits and vegetables into the United States. Approved phytosanitary treatments are listed in § 305.2. The Plant Protection Act (7 U.S.C. 7701 *et seq.*, June 20, 2000) is the statutory basis for 7 CFR parts 305 and 319. It authorizes the Secretary of Agriculture to implement programs and policies designed to prevent the introduction and spread of plant pests and diseases.

Description and Estimated Number of Small Entities Regulated

The proposed rule may directly affect U.S. domestic producers of Hass avocados, as well as firms responsible for packing and shipping these commodities for domestic and foreign markets. We find that a substantial number of these businesses are small entities, according to Small Business Administration (SBA) guidelines and based on *2002 Census of Agriculture* data. SBA classifies producers within the category Other Non-Citrus Fruit Farming (NAICS 111339) having annual sales of not more than $750,000 as small entities. Nearly all U.S. production of Hass avocados takes place in California, where Hass is the dominant variety grown. According to the *2002 Census of Agriculture Summary and State Data* report, there were a total of 6,251 avocado farms in the United States in 2002, with California farms representing approximately 85 percent (or 4,801 farms) of this total.[7] Of the remaining farms, 839 are located in Florida, 601 are located in Hawaii, and 10 are located in Texas.

APHIS does not have information on the size distribution of the total U.S. avocado producers, but according to *2002 Census of Agriculture,* there were a total of 95,680 Fruit and Tree Nut farms (NAICS 1113) in the United States in 2002.[8] Of this number, nearly 99 percent had annual sales in 2002 of less than $500,000, which is well below the SBA's small-entity threshold of $750,000.[9] While cash receipts by size for avocado farms were not reported in the *2002 Census of Agriculture,* it is reasonable to assume that most of the 6,251 domestic avocado farms currently in operation qualify as small entities.

Avocado packing and shipping establishments, those engaged in postharvest crop activities (NAICS 115114), are also expected to be small according to SBA guidelines. The small-entity standard for packinghouses is $6.5 million or less in annual receipts. In 2004, the California Avocado Commission reported that 51 companies were active handlers of California avocados at the end of October 2003. Of this number, 18 companies had first sales of avocados of under $10,000; 8 companies had avocado sales of between $10,000 and $49,999; 5 companies had sales from $50,000 to $99,999; 5 companies had sales from $100,000 to $499,999; 2 companies had sales from $500,000 to $999,999; 2 companies had sales from $1 million to $4,999,999; 1 company had sales from $5 million to $9,999,999; 2 companies had sales from $10 million to $19,999,999; 6 companies had sales from $20 million to $49,999,999; and 2 companies sold over $50 million worth of California avocados. This information indicates that 40 of the 51 firms are small entities. We conclude that the majority of the handlers that would be affected by the rule are small entities.

We conclude that, while small producing entities will be affected by the proposed rule, the overall net changes in welfare of allowing the importation of fresh Hass avocados from Peru under the specified systems approach are likely to be positive.

Description and Estimate of Compliance Requirements

The proposed rule would include recordkeeping requirements, as described under the Paperwork Reduction Act section of this proposed rulemaking.

Duplication, Overlap, and Conflict With Existing Rules and Regulations

APHIS has not identified any duplication, overlap, or conflict of the proposed rule with other Federal rules.

Regulatory Alternatives to the Proposed Rule

The NPPO of Peru requested that APHIS amend the regulations to allow the importation of avocados into the United States from Peru. As part of the request, Peru included for APHIS' evaluation an export protocol to address the pest risk of those pests that Peru considered as quarantine pests for the United States and that could follow the pathway on avocados imported into the United States. The protocol provided by Peru consisted of the production and packing requirements that are already in place for avocados exported from Peru to the European Union. In response to the request and as indicated above, APHIS prepared a PRA to evaluate the risks associated with the importation of Hass avocados from Peru. The PRA identified six pests of quarantine significance present in Peru that could be introduced into the United States through the importation of Hass avocados:

- *Anastrepha fraterculus* (Wiedemann), the South American fruit fly;
- *Anastrepha striata* Schiner, the guava fruit fly;

[7] National Agricultural Statistics Service (NASS), United States Department of Agriculture (USDA), ''United States: Summary and State Data, Volume 1,'' 2002 Census of Agriculture, issued June 2004.

[8] This number includes farms producing fruit and tree nut varieties and those specifically producing avocados.

[9] Source: SBA and *2002 Census of Agriculture.*

- *Ceratitis capitata* (Wiedemann), the Mediterranean fruit fly (Medfly);
- *Coccus viridis* (Green), the green scale;
- *Ferrisia malvastra* (McDaniel), a mealybug; and
- *Stenoma catenifer* Walsingham, the avocado seed moth.

During review of the export protocol provided by Peru, APHIS found that several pests identified in the PRA were not addressed by the measures included in the Peru NPPO protocol. As a result, APHIS determined that the export protocol provided by Peru would not be sufficient to address the risks associated with the importation of Hass avocados into the United States. Therefore, APHIS developed and is proposing an alternative systems approach to prevent the introduction of these quarantine pests into the United States.

There were several alternatives that APHIS considered other than the systems approach. For instance, APHIS considered only the protocol proposed by Peru. However, that protocol would not have mitigated the pest risk presented by all of the quarantine pests APHIS identified in the PRA. The systems approach that APHIS developed and is proposing includes practical and effective measures to mitigate the risk of the introduction of the quarantine pests identified in the PRA into the United States, and is the only acceptable alternative for the importation of Hass avocados from Peru.

Executive Order 12988

This proposed rule would allow Hass avocados to be imported into the continental United States from Peru. If this proposed rule is adopted, State and local laws and regulations regarding avocados imported under this rule would be preempted while the fruit is in foreign commerce. Fresh avocados are generally imported for immediate distribution and sale to the consuming public and would remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. If this proposed rule is adopted, no retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

National Environmental Policy Act

To provide the public with documentation of APHIS' review and analysis of any potential environmental impacts associated with the importation of Hass avocados from Peru, we have prepared an environmental assessment. The environmental assessment was prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

The environmental assessment may be viewed on the Regulations.gov Web site or in our reading room. (A link to Regulations.gov and information on the location and hours of the reading room are provided under the heading **ADDRESSES** at the beginning of this proposed rule.) In addition, copies may be obtained by calling or writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. APHIS–2008–0126. Please send a copy of your comments to: (1) Docket No. APHIS–2008–0126, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer, OCIO, USDA, room 404–W, 14th Street and Independence Avenue, SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

We are proposing to amend the fruits and vegetables regulations to allow the importation of Hass avocados from Peru into the continental United States. As a condition of entry, Hass avocados from Peru would have to be produced in accordance with a systems approach that would include requirements for importation in commercial consignments; registration and monitoring of places of production and packinghouses; grove sanitation; pest-free areas or trapping for fruit flies; surveys for the avocado seed moth; and inspection for quarantine pests by the national plant protection organization of Peru. Implementation of this proposed rule would require the submission of documents such as phytosanitary certificates, trust fund agreements, workplans, records for recordkeeping, and registration and inspection forms.

We are soliciting comments from the public (as well as affected agencies) concerning our proposed information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the proposed information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond (such as through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses).

Estimate of burden: Public reporting burden for this collection of information is estimated to average 0.6103 hours per response.

Respondents: Importers of Hass avocados and foreign officials.

Estimated annual number of respondents: 2.

Estimated annual number of responses per respondent: 252.

Estimated annual number of responses: 503.

Estimated total annual burden on respondents: 307 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this proposed rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

Lists of Subjects

7 CFR Part 305

Irradiation, Phytosanitary treatment, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements.

7 CFR Part 319

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we propose to amend 7 CFR parts 305 and 319 as follows:

PART 305—PHYTOSANITARY TREATMENTS

1. The authority citation for part 305 continues to read as follows:

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

2. In § 305.2, the table in paragraph (h)(2)(i) is amended by adding in alphabetical order, under Peru, a new entry for avocado to read as follows:

§ 305.2 Approved treatments.

* * * * *

(h) * * *

(2) * * *

(i) * * *

Location	Commodity	Pest	Treatment schedule
*	*	*	*
Peru			
*	*	*	*
	Avocado	*Ceratitis capitata*	MB T101–c–1, MB&CT T108–a–1, MB&CT T108–a–2, MB&CT T108–a–3, CT T107–a.
*	*	*	*

* * * * *

PART 319—FOREIGN QUARANTINE NOTICES

3. The authority citation for part 319 continues to read as follows:

Authority: 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

4. A new § 319.56–49 is added to read as follows:

§ 319.56–49 Hass avocados from Peru.

Fresh Hass variety avocados (*Persea americana* P. Mill.) may be imported into the continental United States from Peru only under the conditions described in this section. These conditions are designed to prevent the introduction of the following quarantine pests: *Anastrepha fraterculus* (Wiedemann), the South American fruit fly; *Anastrepha striata* Schiner, the guava fruit fly; *Ceratitis capitata* (Wiedemann), the Mediterranean fruit fly; *Coccus viridis* (Green), the green scale; *Ferrisia malvastra* (McDaniel), a mealybug; and *Stenoma catenifer* Walsingham, the avocado seed moth.

(a) *General requirements.* (1) The national plant protection organization (NPPO) of Peru must provide a workplan to APHIS that details the activities that the NPPO of Peru will, subject to APHIS' approval of the workplan, carry out to meet the requirements of this section. The NPPO of Peru must also establish a trust fund in accordance with § 319.56–6.

(2) The avocados must be grown at places of production that are registered with the NPPO of Peru and that meet the requirements of this section.

(3) The avocados must be packed for export to the United States in packinghouses that are registered with the NPPO of Peru and that meet the requirements of this section.

(4) Avocados from Peru may be imported in commercial consignments only.

(b) *Monitoring and oversight.* (1) The NPPO of Peru must visit and inspect registered places of production monthly, starting at least 2 months before harvest and continuing until the end of the shipping season, to verify that the growers are complying with the requirements of paragraphs (c) and (f) of this section and follow pest control guidelines, when necessary, to reduce quarantine pest populations. If trapping is conducted under paragraphs (d)(2) or (e)(2) of this section, the NPPO of Peru must also verify that the growers are complying with the requirements in those paragraphs and must certify that each place of production has effective fruit fly trapping programs. Any personnel conducting trapping and pest surveys under paragraphs (d), (e), and (f) of this section must be trained and supervised by the NPPO of Peru. APHIS may monitor the places of production if necessary.

(2) In addition to conducting fruit inspections at the packinghouses, the NPPO of Peru must monitor packinghouse operations to verify that the packinghouses are complying with the requirements of paragraph (h) of this section.

(3) If the NPPO of Peru finds that a place of production or packinghouse is not complying with the requirements of this section, no fruit from the place of production or packinghouse will be eligible for export to the United States until APHIS and the NPPO of Peru conduct an investigation and appropriate remedial actions have been implemented.

(4) The NPPO of Peru must retain all forms and documents related to export program activities in groves and packinghouses for at least 1 year and, as requested, provide them to APHIS for review.

(c) *Grove sanitation.* Avocado fruit that has fallen from the trees must be removed from each place of production at least once every 7 days, starting 2 months before harvest and continuing to the end of harvest. Fallen avocado fruit may not be included in field containers of fruit brought to the packinghouse to be packed for export.

(d) *Mitigation measures for A. fraterculus and A. striata.* Places of production must meet one of the following requirements for *A. fraterculus* and *A. striata*:

(1) *Pest-free area.* The avocados must be produced in a place of production located in an area that is designated as free of *A. fraterculus* and *A. striata* in accordance with § 319.56–5.

(2) *Place of production with low pest prevalence.* (i) Beginning at least 1 year before harvest begins and continuing through the end of the harvest, trapping

must be conducted in registered places of production with at least 1 trap per 0.2 square kilometers (km²) to demonstrate that the places of production have a low prevalence of *A. fraterculus* and *A. striata*. APHIS-approved traps baited with APHIS-approved plugs must be used and serviced at least once every 2 weeks.

(ii) During the trapping, when traps are serviced, if *A. fraterculus* and *A. striata* are trapped at a particular place of production at cumulative levels above 0.7 flies per trap per day, pesticide bait treatments must be applied in the affected place of production in order for the place of production to remain eligible to export avocados to the United States. The NPPO of Peru must keep records of fruit fly detections for each trap, update the records each time the traps are checked, and make the records available to APHIS inspectors upon request.

(e) *Mitigation measures for C. capitata.* Places of production must meet one of the following requirements for *C. capitata*:

(1) *Pest-free area.* The avocados must be produced in a place of production located in an area that is designated as free of *C. capitata* in accordance with § 319.56–5.

(2) *Pest-free place of production.* (i) Beginning at least 1 year before harvest begins and continuing through the end of the harvest, trapping must be conducted in registered places of production to demonstrate that the places of production are free of *C. capitata*. There must be at least 2 traps per km² in commercial production areas. APHIS-approved traps baited with APHIS-approved plugs must be used and serviced at least once every 2 weeks.

(ii) During the trapping, when traps are serviced, if any *C. capitata* are found, 10 additional traps must be deployed in a 0.5-km² area immediately surrounding all traps where *C. capitata* was found to determine whether a reproducing population is established. If any additional *C. capitata* are found within 30 days of the first detection, the affected place of production will be ineligible to export avocados without treatment for *C. capitata* until the source of the infestation is identified and the infestation is eradicated. APHIS must concur with the determination that the infestation has been eradicated. The NPPO of Peru must keep records of fruit fly detections for each trap, update the records each time the traps are checked, and make the records available to APHIS inspectors upon request.

(3) *Treatment.* If the avocados do not meet the conditions of paragraphs (e)(1) or (e)(2) of this section, or if a reproducing population of *C. capitata* is detected at a place of production and the infestation has not yet been eradicated, avocados from that place of production may only be exported to the United States if they are treated in accordance with part 305 of this chapter.

(f) *Surveys for S. catenifer.* (1) Peruvian departamentos in which avocados are grown for export to the United States must be surveyed by the NPPO of Peru at least once annually, no more than 2 months before harvest begins, and found to be free from infestation by *S. catenifer*. APHIS must approve the survey protocol used to determine and maintain pest-free status and the actions to be performed if *S. catenifer* is detected. Surveys must include representative areas from all parts of each registered place of production in each departamento. The NPPO of Peru must cut and inspect a biometric sample of fruit at a rate determined by APHIS. Fruit sampled must be either from the upper half of the tree or from the ground. Sampled fruit must be cut and examined for the presence of eggs and larvae of *S. catenifer* in the pulp or seed and for the presence of eggs in the pedicel.

(2) If one or more *S. catenifer* is detected in the annual survey, the affected place of production will be immediately suspended from the export program until appropriate measures to reestablish pest freedom, agreed upon by the NPPO of Peru and APHIS, have been taken. The NPPO of Peru must keep records of *S. catenifer* detections for each orchard, update the records each time the orchards are surveyed, and make the records available to APHIS inspectors upon request. The records must be maintained for at least 1 year after the beginning of the harvest.

(g) *Harvesting requirements.* Harvested avocados must be placed in field cartons or containers that are marked with the official registration number of the place of production. The place of production where the avocados were grown must remain identifiable when the fruit leaves the grove, at the packinghouse, and throughout the export process. The fruit must be moved to a registered packinghouse within 3 hours of harvest or must be protected from fruit fly infestation until moved. The fruit must be safeguarded by an insect-proof screen or plastic tarpaulin while in transit to the packinghouse and while awaiting packing.

(h) *Packinghouse requirements.* (1) During the time registered packinghouses are in use for packing avocados for export to the United States, the packinghouses may only accept avocados that are from registered places of production and that are produced in accordance with the requirements of this section.

(2) Avocados must be packed within 24 hours of harvest in an insect-exclusionary packinghouse. All openings to the outside of the packinghouse must be covered by screening with openings of not more than 1.6 mm or by some other barrier that prevents pests from entering. The packinghouse must have double doors at the entrance to the facility and at the interior entrance to the area where the avocados are packed.

(3) Before packing, all avocados must be cleaned of all plant debris.

(4) Fruit must be packed in insect-proof packaging, or covered with insect-proof mesh or a plastic tarpaulin, for transport to the United States. These safeguards must remain intact until arrival in the United States.

(5) Shipping documents accompanying consignments of avocados from Peru that are exported to the United States must include the official registration number of the place of production at which the avocados were grown and must identify the packing shed or sheds in which the fruit was processed and packed. This identification must be maintained until the fruit is released for entry into the United States.

(i) *NPPO of Peru inspection.* Following any post-harvest processing, inspectors from the NPPO of Peru must inspect a biometric sample of fruit from each place of production at a rate to be determined by APHIS. The inspectors must visually inspect for the quarantine pests listed in the introductory text of this section and must cut fruit to inspect for *S. catenifer*. Unless the avocados were produced in a pest-free area as described in paragraph (d)(1) of this section, the inspectors must cut fruit to inspect for *A. fraterculus* and *A. striata*. Unless the avocados were produced in a pest-free area as described in paragraph (e)(1) of this section, the inspectors must cut fruit to inspect for *C. capitata*. If any quarantine pests are detected in this inspection, the place of production where the infested avocados were grown will immediately be suspended from the export program until an investigation has been conducted by APHIS and the NPPO of Peru and appropriate mitigations have been implemented. If *C. capitata* is detected, avocados from the place of production where the infested avocados were produced may be imported into the United States only if treated with an approved treatment for *C. capitata* in

accordance with part 305 of this chapter.

(j) *Phytosanitary certificate.* Each consignment of Hass avocados imported from Peru into the United States must be accompanied by a phytosanitary certificate issued by the NPPO of Peru with an additional declaration stating that the avocados in the consignment were grown, packed, and inspected and found to be free of pests in accordance with the requirements of 7 CFR 319.56–48. In addition:

(1) If the avocados were produced in an area free of *A. fraterculus* and *A. striata*, the phytosanitary certificate must state that the avocados in this consignment were produced in an area designated as free of *A. fraterculus* and *A. striata* in accordance with 7 CFR 319.56–5.

(2) If the avocados were produced in an area free of *C. capitata*, the phytosanitary certificate must state that the avocados in this consignment were produced in an area designated as free of *C. capitata* in accordance with 7 CFR 319.56–5.

(3) If the avocados have been treated for *C. capitata* prior to export, the phytosanitary certificate must state that the avocados in the consignment have been treated for *C. capitata* in accordance with 7 CFR part 305.

Done in Washington, DC, this 31st day of December 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–31474 Filed 1–6–09; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1365; Directorate Identifier 2008–NM–076–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A319, A320, and A321 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as: In 2005 a lateral runway excursion occurred on an A320 aircraft. Such excursions are classified as hazardous, with a large reduction in safety margins. Investigation has shown that the aircraft landed with the nose wheels rotated nearly 20 degrees from center. During subsequent tests on the removed BSCU [Braking and Steering Control Unit], a BSCU hardware failure was found, affecting the monitoring function, including the system reconfiguration management, and leading to a runaway of [the] Nose Wheel Steering [uncommanded steering]. An uncommanded steering condition during takeoff or landing could result in departure of the airplane from the runway. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by February 6, 2009.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Tim Dulin, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2141; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–1365; Directorate Identifier 2008–NM–076–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2008–0048, dated February 28, 2008 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> In 2005 a lateral runway excursion occurred on an A320 aircraft. Such excursions are classified as hazardous, with a large reduction in safety margins. Investigation has shown that the aircraft landed with the nose wheels rotated nearly 20 degrees from center. During subsequent tests on the removed BSCU [Braking and Steering Control Unit], a BSCU hardware failure was found, affecting the monitoring function, including the system reconfiguration management, and leading to a runaway of [the] Nose Wheel Steering [uncommanded steering].
>
> DGAC [Direction Générale de l'Aviation Civile] Airworthiness Directive (AD) F–1992–117–025(B), Revision 1 [which corresponds to FAA AD 94–24–07], mandated the BSCU upgrade in order to improve the steering logic, but this modification has shown not to be sufficient to address the identified failure mechanism.
>
> A software modification is now implemented in BSCU standard 10 which improves the system reconfiguration management when this failure mechanism is detected.
>
> BSCU standard 10 also includes other improvements—as detailed in the associated Service Bulletin.
>
> This AD therefore mandates the modification or replacement of the BSCU standard 7, 9 or 9.1, by the BSCU standard 10.

This AD also requires replacement of certain DUNLOP tires that are not compatible with BSCU standard 10. An uncommanded steering condition

during takeoff or landing could result in departure of the airplane from the runway. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Airbus has issued Mandatory Service Bulletin A320–32–1336, Revision 01, dated January 10, 2008. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

Other Relevant Rulemaking

On November 21, 1994, we issued AD 94–24–07, amendment 39–9080 (59 FR 62998 December 7, 1994). That AD applies to certain Airbus Model A320 series airplanes, line numbers 001 through 813 inclusive. That AD requires modification of the brake steering control unit (BSCU). That AD resulted from reports that the BSCU on Model A320 airplanes allowed a 90-degree rotation of the nose gear after landing, which resulted in significant damage to the wheels. The actions specified by that AD are intended to prevent failure of the nose gear tires and wheels and the loss of directional control of the airplane while it is on the ground. The actions required by this proposed AD terminate the modification required by AD 94–24–07.

Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 591 products of U.S. registry. We also estimate that it would take about 3 work hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $141,840, or $240 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. ''Subtitle VII: Aviation Programs,'' describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Airbus: Docket No. FAA–2008–1365; Directorate Identifier 2008–NM–076–AD.

Comments Due Date

(a) We must receive comments by February 6, 2009.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Airbus Model A319–111, –112, –113, –114, –115, –131, –132, and –133; A320–111, –211, –212, –214, –231, –232, and –233; and A321–111, –112, –131, –211, –212, –213, –231, and –232 series airplanes; certificated in any category; equipped with one conventional pre-Enhanced Manufacture and Maintainability (pre-EMM) Braking and Steering Control Unit (BSCU), having the part numbers specified in paragraphs (c)(1), (c)(2), or (c)(3) of this AD.

(1) C20216332292C (standard 7) installed by Airbus Modification 24449 in production, or by Airbus Service Bulletin A320–32–1124 in service.

(2) C202163372D32 (standard 9) installed by Airbus Modification 31106 in production, or by Airbus Service Bulletin A320–32–1227 or A320–32–1232 in service.

(3) C202163382D32 (standard 9.1) installed by Airbus Modification 32500 in production, or by Airbus Service Bulletin A320–32–1254 in service.

Subject

(d) Air Transport Association (ATA) of America Code 32: Landing gear.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

In 2005 a lateral runway excursion occurred on an A320 aircraft. Such excursions are classified as hazardous, with a large reduction in safety margins. Investigation has shown that the aircraft landed with the nose wheels rotated nearly 20 degrees from center. During subsequent tests on the removed BSCU [Braking and Steering Control Unit], a BSCU hardware failure was found, affecting the monitoring function, including the system reconfiguration management, and leading to a runaway of [the] Nose Wheel Steering [uncommanded steering].

DGAC [Direction Générale de l'Aviation Civile] Airworthiness Directive (AD) F–1992–117–025(B), Revision 1 [which corresponds to FAA AD 94–24–07], mandated the BSCU upgrade in order to improve the steering logic, but this modification has shown not to be sufficient to address the identified failure mechanism.

A software modification is now implemented in BSCU standard 10 which improves the system reconfiguration management when this failure mechanism is detected.

BSCU standard 10 also includes other improvements—as detailed in the associated Service Bulletin.

This AD therefore mandates the modification or replacement of the BSCU standard 7, 9 or 9.1, by the BSCU standard 10.

This AD also requires replacement of certain DUNLOP tires that are not compatible with BSCU standard 10. An uncommanded steering condition during takeoff or landing could result in departure of the airplane from the runway.

Actions and Compliance

(f) Unless already done, do the following actions.

(1) Within 18 months after the effective date of this AD: Modify or replace the BSCU in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A320–32–1336, Revision 01, dated January 10, 2008; and inspect the airplane to determine if DUNLOP tires 46x16–20 having part number (P/N) 11659 T or 11661 T are installed. If those tires are installed, before further flight, replace with acceptable tires using a method approved by either the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA) (or its delegated agent). Accomplishment of the applicable requirements in this paragraph terminates the requirements of AD 94–24–07, amendment 39–9080.

(2) Previous accomplishment of the modification or replacement of the BSCU before the effective date of this AD in accordance with Airbus Mandatory Service Bulletin A320–32–1336, dated September 19, 2007, meets the requirements of paragraph (f)(1) of this AD.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: Although the MCAI and service information do not provide procedures for replacing the tires as specified in paragraph (f)(1) of this AD, this AD requires that you replace the tires using a method approved by either the Manager, International Branch, ANM–116, FAA, or the EASA (or its delegated agent).

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to *Attn:* Tim Dulin, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2141; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI EASA Airworthiness Directive 2008–0048, dated February 28, 2008, and Airbus Mandatory Service Bulletin A320–32–1336, Revision 01, dated January 10, 2008, for related information.

Issued in Renton, Washington, on December 18, 2008.

Stephen P. Boyd,

Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–30 Filed 1–6–09; 8:45 am]

BILLING CODE 4910–13–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 201

[Docket No. RM 2008–8]

Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking; correction.

SUMMARY: The Copyright Office published in the Federal Register on December 29, 2008, a notice pertaining to its triennial rulemaking proceeding in accordance with a provision of the Copyright Act which was added by the Digital Millennium Copyright Act and which provides that the Librarian of Congress may exempt certain classes of works from the prohibition against circumvention of technological measures that control access to copyrighted works. This document makes technical corrections to clarify the record of the proposed rulemaking.

FOR FURTHER INFORMATION CONTACT: Rob Kasunic, Principal Legal Advisor, Office of the General Counsel, Copyright GC/I&R, P.O. Box 70400, Washington, DC 20024–0400. Telephone (202) 707–8380; telefax (202) 707–8366.

SUPPLEMENTARY INFORMATION: The Copyright Office published in the Federal Register on December 29, 2008, a notice of proposed rulemaking pertaining to the fourth triennial rulemaking proceeding required by § 1201(a)(1)(C) of the Copyright Act. The notice contained a list of the proposed classes of work that the Office will consider for exemption from the prohibition against circumvention of technological measures that control access to copyrighted works. As published, the notice contained errors which could be misleading and/or require clarification.

Correction

In the Federal Register of December 29, 2008, in Docket No. RM 2008–8, make the following corrections:

1. On page 79425, in the third column, in the ''ADDRESSES'' section, line 12, the website address is corrected to read ''http://www.copyright.gov/1201/comment–forms''.

2. On page 79427, in the first column, paragraph 7 is corrected to read:

''Computer programs'' [for forensic analysis]. Proponent: Glenn Pannenborg.

3. On page 79427, in the third column, the third paragraph, line 6, the word ''proceeding'' is corrected to read ''preceding''.

Dated: January 2, 2009.

David O. Carson,

General Counsel.

[FR Doc. E9–61 Filed 1–6–09; 8:45 am]

BILLING CODE 1410–30–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2007–0927; FRL–8760–5]

Approval, Disapproval, and Promulgation of Air Quality Implementation Plans; Utah; Revisions to New Source Review Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to partially approve and partially disapprove State Implementation Plan revisions submitted by the State of Utah on September 15, 2006, October 1, 2007, and March 7, 2008 to Utah's Rule R307–405 (''Permits: Major Sources in Attainment or Unclassified Areas (PSD)'') and to Utah's Rule R307–110–9 (''Section VIII, Prevention of Significant Deterioration of the Utah Air Quality Rules''). Utah adopted these rules on June 15, 2006, July 11, 2007, and January 9, 2008 and these rules became State-effective on June 16, 2006, September 7, 2007, and January 11, 2008 respectively. Utah has a federally approved Prevention of Significant Deterioration (PSD) program for new and modified sources impacting attainment areas in the State. This action is being taken under section 110 of the Clean Air Act.

DATES: Comments must be received on or before February 6, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2007–0927, by one of the following methods:

- *www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *E-mail: videtich.callie@epa.gov* and *leone.kevin@epa.gov.*
- *Fax:* (303) 312–6064 (please alert the individual listed in the **FOR FURTHER INFORMATION CONTACT** section if you are faxing comments).
- *Mail:* Callie A. Videtich, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129.
- *Hand Delivery:* Callie A. Videtich, Director, Air Program, Environmental Protection Agency (EPA), Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129. Such deliveries are only accepted Monday through Friday, 8 a.m. to 4:30 p.m., excluding Federal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R08–OAR–2007–0927. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA, without going through *www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, go to Section I. General Information of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Kevin Leone, Air Program, Mailcode 8P–AR, Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6227, or *leone.kevin@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The word *Act* or initials *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words *EPA, we, us* or *our* mean or refer to the United States Environmental Protection Agency.

(iii) The initials *SIP* mean or refer to State Implementation Plan.

(iv) The words *State* or *Utah* mean the State of Utah, unless the context indicates otherwise.

I. General Information

A. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

a. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

b. Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

d. Describe any assumptions and provide any technical information and/or data that you used.

e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

f. Provide specific examples to illustrate your concerns, and suggest alternatives.

g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

h. Make sure to submit your comments by the comment period deadline identified.

II. What Is Being Addressed in This Document?

On September 15, 2006, the State of Utah submitted revisions to revise the Utah State Implementation Plan (SIP) and rules. These revisions addressed the federal New Source Review Reform Rule published by EPA on December 31, 2002 (67 FR 80186). Specifically, Utah submitted a revision to Utah rule R307–110–9 (hereafter referred to as R307–110–9), which incorporates SIP section VIII into the Utah Administrative Code. The only change to R307–110–9, was to revise the date that the rule was most recently amended by the Utah Air Quality Board (UAQB) from December 18, 1992 to February 1, 2006. Utah also submitted SIP Section VIII, entitled Prevention of Significant Deterioration (PSD), which was completely revised, and Utah rule R307–405 (hereafter referred to R307–405). The revised R307–405 generally incorporates by reference the federal PSD requirements found at 40 CFR 52.21.

The revisions submitted by the State of Utah on October 1, 2007 updated the incorporation by reference section in R307–405 to reflect the July 1, 2006 version of the Code of Federal Regulations and to make a number of other changes to the rule text that are required due to the change in the incorporation by reference date.

The revisions submitted by the State of Utah on March 7, 2008 updated the incorporation by reference section in R307–405 to reflect the July 1, 2007 version of the Code of Federal Regulations.

As described below in sections III and IV of this action, EPA is proposing to approve and disapprove revisions to R307–405 (''Permits: Major Sources in Attainment or Unclassified Areas (PSD)'') and approve R307–110–9 (''Section VIII, Prevention of Significant Deterioration of the Utah Air Quality Rules''), which includes an amended Section VIII into the Utah SIP. These revisions to R307–110–9 and R307–405 were submitted to EPA by the Utah Department of Environmental Quality (UDEQ) on September 15, 2006, October 1, 2007, and March 7, 2008 and relate to the PSD permit program of the State of Utah. These revisions to R307–405 that were submitted to us on March 7, 2008 were adopted by the Utah Air Quality Board on January 9, 2008 and became State-effective on January 11, 2008. The March 7, 2008 submittal supersedes the prior submittals and is the version of R307–405 that we are proposing partial approval and partial disapproval in this action.

We note that on February 12, 1982, EPA approved into the Utah SIP PSD permitting regulations. On December 31, 2002, EPA published revisions to the federal PSD and non-attainment NSR regulations in 40 CFR Parts 51 and 52 (67 FR 80186). These revisions are commonly referred to as the ''NSR Reform'' regulations and became effective nationally in areas not covered by a SIP on March 3, 2003. These regulatory revisions included provisions for baseline emissions determinations, actual-to-future-actual methodology, ''Plantwide Applicability Limits (PALs)'', ''Clean Units'', and ''Pollution Control Projects''. As stated in the December 31, 2002 rulemaking, State and local permitting agencies were required to adopt and submit revisions to their 40 CFR part 51 permitting programs implementing the minimum program elements of that rulemaking (67 FR 80240). With the September 15, 2006 submittal, Utah requested approval of its PSD program revisions into the SIP that satisfy this requirement.

On November 7, 2003, EPA published a reconsideration of the NSR Reform regulations that clarified two provisions in the regulations by including a definition of ''replacement unit'' and by clarifying that the plantwide applicability limitation (PAL) baseline calculation procedures for newly constructed units do not apply to modified units (68 FR 63021).

On June 24, 2005, the United States Court of Appeals for the District of Columbia Circuit issued its ruling on challenges to the December 2002 NSR Reform revisions (*State of New York et al.* v. *EPA,* 413 F.3d 3 (DC Cir. 2005)). Although the Court upheld most of EPA's rules, it vacated both the ''Clean Unit'' and the ''Pollution Control Project'' provisions and remanded back to EPA the recordkeeping provision in 40 CFR 52.21(r)(6) that required a stationary source to keep records of projects when there was a ''reasonable possibility'' that the project could result in a significant emissions increase. The phrase ''reasonable possibility'' used in the federal rule in 40 CFR 52.21(r)(6) limits the recordkeeping provisions to modifications at facilities that use the actual-to-future-actual methodology to calculate emissions changes and that may have a ''reasonable possibility'' of a significant emissions increase.

On December 21, 2007, EPA published a final rule in response to the DC Circuit Court's remand of the recordkeeping provisions of EPA's 2002 NSR Reform Rules (see 72 FR 70607) in which EPA clarified what constitutes ''reasonable possibility''. The version of R307–405–19 that was submitted for approval into Utah's SIP on March 7, 2008 does incorporate by reference the phrase ''reasonable possibility'' of the recordkeeping provisions at 40 CFR 52.21(r)(6). We note, however, that R307–405–19 only incorporates by reference the July 1, 2007 effective version of the Code of Federal Regulations and, therefore, does not incorporate by reference EPA's December 21, 2007 final rule (see 72 FR 70607) that clarified what constitutes ''reasonable possibility''. To address this issue, Utah submitted a commitment letter to EPA dated September 4, 2008 that acknowledges this federal rule change and that the State's PSD regulations will continue to follow the ''reasonable possibility'' provisions in a manner that is consistent with EPA's final rule.

On October 27, 2003 EPA published the Routine Equipment Replacement Provision (68 FR 61248), which specified at 40 CFR 52.21(cc) the criteria for routine equipment and replacement. On March 17, 2006, the Court of Appeals for the DC Circuit vacated EPA's final Routine Equipment Replacement Provision.

In its March 8, 2008 submittal of the revisions to R307–405, Utah did not incorporate the vacated ''Clean Unit'', ''Pollution Control Projects'', or ''Routine Equipment Replacement provisions''.

III. What are the changes that EPA is proposing to approve?

EPA is proposing to approve a revision to Utah's SIP that would, for the most part, incorporate by reference the federal PSD requirements, found in 40 CFR 52.21, into the State's PSD program and replace EPA's prior approvals. The March 7, 2008 submitted

revision to R307–405 incorporates by reference the provisions of 40 CFR 52.21 as they existed on July 1, 2007, with the exceptions noted below.

Utah did not incorporate by reference those sections of the federal rules that do not apply to State activities or are reserved for the Administrator of the EPA. These sections are 40 CFR 52.21(a)(1) (Plan disapproval), 52.21(q) (Public participation), 52.21(s) (Environmental impact statements), 52.21(t) (Disputed permit or redesignations), and 52.21(u) (Delegation of authority). Utah did not incorporate by reference the vacated federal requirements for ''Equipment Replacement'', ''Clean Unit'', and ''Pollution Control Project''.

Utah's March 7, 2008 submittal of the incorporation by reference revisions to R307–405 describes the circumstances in which the term ''Administrator'' continues to mean the EPA Administrator, and when it means instead the Executive Secretary of the Utah Air Quality Board. R307–405–3(3)(d)(ii)) identifies the following provisions in R307–405 where the term ''Administrator'' continues to mean the Administrator of EPA: 40 CFR 52.21(b)(17), 52.21(b)(37)(i), 52.21(b)(43), 52.21(b)(48)(ii)(c), 52.21(b)(50)(i), 52.21(l)(2), and 52.21(p)(2).

As noted above, Utah did not incorporate by reference 40 CFR 52.21(q) (Public participation). Utah has instead incorporated by reference 40 CFR 51.166(q) (Public participation) at Utah rule R307–405–18. The provisions in 40 CFR 51.166 identify what a SIP must contain for EPA to approve a PSD permit program, and generally mirror the federal PSD regulations at 40 CFR 52.21. In addition, Utah added in Utah rule R307–405–18(2) an additional provision that modifies the PSD permit public participation requirements in 40 CFR 51.166(q) to be specific for Utah.

The following provisions in R307–405 do not incorporate by reference 40 CFR 52.21, but instead either add language that is currently contained in the Utah SIP or add language specific to Utah's PSD program: R307–405–4 (''Area Designations''), R307–405–5 (''Area Redesignation''), and R307–405–8 (''Exclusions from Increment Consumption''). We have determined that these provisions are consistent with the requirements for SIP approved States contained in 40 CFR 51.166(e), (f), and (g).

EPA is also proposing approval of the September 15, 2006 submitted revision R307–110–9 (''Section VIII, Prevention of Significant Deterioration of the Utah Air Quality Rules''). This revision updates the reference to Section VIII, ''Prevention of Significant Deterioration of the Utah Air Quality Rules'' to indicate that the most currently amended version is March 8, 2006. EPA is also proposing approval of the March 8, 2006 version of Section VIII, Prevention of Significant Deterioration of the Utah Air Quality Rules into the SIP. Section VIII summarizes, in a narrative fashion, the current federal PSD requirements, in addition to the Utah specific permitting requirements for new and modified sources and area designations. We are also proposing approval of the March 8, 2006 version of Section VIII into the SIP as it would replace the federally-approved December 18, 1992 version currently in the Utah SIP.

As described above, the requirements included in Utah's PSD program, as specified in R307–405 are substantively the same as the federal PSD provisions due to Utah's incorporation of the federal rules by reference. The revisions Utah made, in consideration of the requirements provided in 40 CFR 52.21, were reviewed by EPA and found to be as stringent as the Federal rules, except as noted above regarding the provision in R307–405–3(3)(a)(i). Therefore, EPA has determined that, except for R307–405–3(3)(a)(i), the rule revisions to R307–405, R307–110–9, and Utah SIP Section VIII are consistent with the program requirements for the preparation, adoption, and submittal of implementation plans for the Prevention of Significant Deterioration of Air Quality, as set forth in 40 CFR 51.166, and are approvable.

IV. What are the changes that EPA is proposing to disapprove?

Utah has adopted a specific definition of ''Major Source Baseline Date'', found at R307–405–3(3)(a)(i), in its revised PSD rule. Part of this definition deviates from the federal definition found in 40 CFR 52.21(b)(14). Utah's definition specifies that the PM_{10} major source baseline date is the ''date that EPA approves the PM_{10} maintenance plan that was adopted by the Board on July 6, 2005'' for Davis, Salt Lake, Utah, and Weber Counties. The federal definition in 40 CFR 52.21(b)(14) specifies January 6, 1975 as the major source baseline date for PM_{10}, and the current EPA-approved SIP for Utah also specifies January 6, 1975 as the major source baseline date for PM–10 for the entire state (refer to Utah's SIP-approved rule R307–101–2 ''Definitions''). EPA is not aware of any authority for it to approve into a SIP a different major source baseline date other than January 6, 1975. Further, we note there is no provision in the Clean Air Act for using a different date if an area was in a legally designated non-attainment status on January 6, 1975. EPA is proposing to disapprove Utah's definition of ''Major Source Baseline Date'', and therefore, the current federally-approved definition found in R307–101–2 would continue to apply as a federally enforceable provision in lieu of the State-adopted version. However, if prior to our final SIP rulemaking action, Utah submits a SIP revision to their PSD rule to make the definition of ''Major Source Baseline Date'' consistent with the Federal definition used in 40 CFR 52.21(b)(14) EPA would then be able to approve an incorporation by reference of 40 CFR 52.21(b)(14).

V. What action is EPA taking today?

We propose to partially approve revisions to R307–405. (''Permits: Major Sources in Attainment or Unclassified Areas (PSD)'') and to approve revisions to R307–110–9. (''Section VIII, Prevention of Significant Deterioration of the Utah Air Quality Rules'') and Utah SIP Section VIII. EPA is proposing to disapprove R307–405–3.(3)(a)(i) because it defines ''Major Source Baseline Date'' in a manner inconsistent with the Federal definition found at 40 CFR 52.21(b)(14). In all other respects we are approving the State's March 7, 2008 submitted revisions to R307–405, and the State's September 15, 2006 submitted revisions of R307–110–9, and Utah SIP Section VIII.

VI. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities

under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

• Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds, Incorporation by reference.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: November 24, 2008.

Stephen S. Tuber,

Acting Regional Administrator, Region 8.

[FR Doc. E9–48 Filed 1–6–09; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 74, No. 4
Wednesday, January 7, 2009

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Notice of Funds Availability; Inviting Applications for the Emerging Markets Program; Correction

AGENCY: Foreign Agricultural Service, U.S. Department of Agriculture.

ACTION: Notice; correction.

SUMMARY: The Foreign Agricultural Service published a document in the **Federal Register** of December 18, 2008, concerning funds availability and inviting applications for the Emerging Markets Program. The document contained incorrect dates.

FOR FURTHER INFORMATION CONTACT: Mark Slupek, 202–720–4327.

Correction

In the **Federal Register** of December 18, 2008, in FR Doc. E8–30071, on page 77000, in the first column, correct the **DATES** caption to read:

DATES: All proposals must be received by 5 p.m. Eastern Standard Time, January 21, 2009. Applications received after this time will be considered only if funds are still available.

In the **Federal Register** of December 18, 2008, in FR Doc. E8–30071, on page 77002, in the second column, correct the ''3. Submission Dates and Times'' caption to read:

3. Submission Dates and Times. All applications must be received by 5 p.m. Eastern Standard Time, January 21, 2009 in the Grants Management Branch either electronically or hand delivered. Applications received after this time will be considered only if funds are still available.

In the **Federal Register** of December 18, 2008, in FR Doc. E8–30071, on page 77002, in the second column, correct the ''5. Other Submission Requirement and Considerations'' caption to read:

5. Other Submission Requirements and Considerations. All Internet-based applications must be properly submitted by 5 p.m. Eastern Standard Time, January 21, 2009.

All applications on compact disc (using Word or compatible format, with two accompanying paper copies) and any other form of application must be received by 5 p.m. Eastern Standard Time, January 21, 2009, at the following address:

Hand Delivery (including FedEx, DHL, UPS, etc.): U.S. Department of Agriculture, Foreign Agricultural Service, Grants Management Branch, Portals Office building, Suite 400, 1250 Maryland Avenue, SW., Washington, DC 20024.

Dated: December 24, 2008.

W. Kirk Miller,

Acting Administrator, Foreign Agricultural Service.

[FR Doc. E8–31469 Filed 1–6–09; 8:45 am]

BILLING CODE 3410–10–M

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Proposed collection; comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Rural Development's intention to request an extension for a currently approved information collection in support of the program for 7 CFR Part 4284, Subpart K, Agriculture Innovation Demonstration Centers.

DATES: Comments on this notice must be received by March 9, 2009 to be considered.

FOR FURTHER INFORMATION CONTACT: Ms. LeAnn M. Oliver, Deputy Administrator, Cooperative Programs, Rural Development, USDA, STOP 3252, Room 4016, 1400 Independence Avenue SW., Washington, DC 20250–3252. Telephone: (202) 720–7558, *E-mail: leann.oliver@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Agriculture Innovation Centers.

OMB Number: 0570–0045.

Expiration Date of Approval: May 31, 2009.

Type of Request: Extension of a currently approved information collection.

Abstract: Centers are required to provide progress reports for the duration of the grant agreement to monitor compliance and measure the success of the program.

Estimate of Burden: Public reporting burden for this collection is estimated to average 4 hours per response.

Respondents: Only the 10 grantees awarded under fiscal year 2003 funding.

Estimated Number of Respondents: 10.

Estimated Number of Responses per Respondent: 3.

Estimated Number of Responses: 30.

Estimated Total Annual Burden on Respondents: 110 hours.

Copies of this information collection can be obtained from Cheryl Thompson, Regulations and Paperwork Management Branch (202) 692–0043.

Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of Rural Development, including whether the information will have practical utility; (b) the accuracy of Rural Development's estimate of the burden to collect the required information, including the validity of the strategy used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments on the paperwork burden may be sent to Cheryl Thompson, Regulations and Paperwork Management Branch, Rural Development, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue SW., Washington, DC 20250–0742. All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: December 31, 2008.

James J. Wadsworth,

Acting Administrator, Rural Business-Cooperative Services.

[FR Doc. E9–72 Filed 1–6–09; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF COMMERCE

U.S. Census Bureau

Proposed Information Collection; Comment Request; Quarterly Financial Report

AGENCY: U.S. Census Bureau.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: To ensure consideration, written comments must be submitted on or before March 9, 2009.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Demetria V. Hanna, U.S. Census Bureau, HQ–6K181, Washington, DC 20233, Telephone (301) 763–6600.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau's Quarterly Financial Report Program (QFR) is planning to expand to include selected Services sectors in the scope of collection along with corporations currently surveyed in the Manufacturing, Mining, Wholesale Trade, and Retail Trade sectors. A new QFR 300 (S) form will be used to collect data from the Information sector, and selected industries in the Professional, Scientific, and Technical Services sector.

The QFR forms to be submitted for approval are: The QFR 200 (MT) long form; QFR 201 (MG) short form; and the new QFR 300 (S) long form. The QFR 200 (MT) and the 201 (MG) have been updated to improve usability for respondents.

The QFR Program has published up-to-date aggregate statistics on the financial results and position of U.S. corporations since 1947. The QFR is a principal economic indicator that also provides financial data essential to the calculation of key Government measures of national economic performance. The importance of this data collection is reflected by the granting of specific authority to conduct the program in Title 13 of the United States Code, section 91, which requires that financial statistics of business operations be collected and published quarterly. Public Law 109–79 extended the authority of the Secretary of Commerce to conduct the QFR Program under section 91 through September 30, 2015.

The main purpose of the QFR is to provide timely, accurate data on business financial conditions for use by Government and private-sector organizations and individuals. The primary public users are U.S. Governmental organizations with economic policymaking responsibilities. In turn, these organizations play a major role in providing guidance, advice, and support to the QFR Program. The primary private-sector data users are a diverse group including universities, financial analysts, unions, trade associations, public libraries, banking institutions, and U.S. and foreign corporations.

II. Method of Collection

The Census Bureau uses two forms of data collection: Mail out/mail back paper survey forms and a secure, encrypted Internet data collection system called Census Taker. Census Taker provides improved quality with automatic data checks and is context-sensitive to assist the data provider in identifying potential reporting problems before submission, thus reducing the need for follow-up. Census Taker is completed via the Internet eliminating the need for downloading software and increasing the integrity and confidentiality of the data.

Companies are asked to respond to the survey within 25 days of the end of the quarter for which the data are being requested. Letters and/or telephone calls encouraging participation are directed to companies in the survey sample that have not responded by the designated time.

III. Data

OMB Control Number: 0607–0432.

Form Number: QFR 200 (MT), QFR 201 (MG) and QFR 300 (S).

Type of Review: Regular submission.

Affected Public: Manufacturing corporations with assets of $250 thousand or more. Mining, Wholesale, Retail Trade and selected Services corporations with assets of $50 million or more.

Estimated Number of Respondents:

Form QFR 200 (MT)—4,577 per quarter = 18,308 annually

Form QFR 201 (MG)—5,030 per quarter = 20,120 annually

Form QFR 300 (S)—1,100 per quarter = 4,400 annually

Total 42,828 annually

Estimated Time Per Response:

Form QFR 200 (MT)—Average hours: 3.0

Form QFR 201 (MG)—Average hours: 1.2

Form QFR 300 (S)—Average hours: 3.0

Estimated Total Annual Burden Hours: 93,000 hours.

Estimated Total Annual Cost: $2.8 million.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13 U.S.C. Sections 91 and 224.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 31, 2008.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–31445 Filed 1–6–09; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[Docket 53–2008]

Foreign–Trade Zone 242 – Boundary County, Idaho, Application for Subzone, Hoku Materials, Inc., Cancellation of Public Hearing

The public hearing scheduled for January 8, 2009, on the application for subzone status at the Hoku Materials, Inc. (Hoku), facility in Pocatello, Idaho (73 FR 59597, 10/9/08) has been cancelled. The party which had requested the hearing, Globe Metallurgical Inc. (Globe), submitted a letter to the Foreign–Trade Zones Board on January 2, 2009, withdrawing its request as a result of Hoku's December 31, 2008, amendment of its application in which Hoku indicated that it would not admit silicon metal subject to antidumping or countervailing duty orders into the proposed subzone facility and would accept an FTZ Board Order condition restricting such admission. Additional information is available on the FTZ Board web page via www.trade.gov/ftz.

As indicated previously, the comment period for this case is open through January 23, 2009. Rebuttal comments may be submitted during the subsequent 15–day period, until February 9, 2009. For further information, contact Diane Finver at Diane__Finver@ita.doc.gov or (202) 482–1367.

Dated: January 5, 2009.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E9–123 Filed 1–5–09; 4:15 pm]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–827]

Certain Cased Pencils from the People's Republic of China; Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''the Department'') has preliminarily determined that the respondents in this review, covering the period December 1, 2006, through November 30, 2007, have made sales of subject merchandise at less than normal value. If these preliminary results are adopted in the final results of this review, we will instruct U.S. Customs and Border Protection (''CBP'') to assess antidumping duties on all appropriate entries. The Department invites interested parties to comment on these preliminary results.

EFFECTIVE DATE: January 7, 2009.

FOR FURTHER INFORMATION CONTACT: Alexander Montoro or David Layton, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–0238 and (202) 482–0371, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 28, 1994, the Department published an antidumping duty order on certain cased pencils from the People's Republic of China (''PRC''). *See Antidumping Duty Order: Certain Cased Pencils from the People's Republic of China*, 59 FR 66909 (December 28, 1994).

On December 3, 2007, the Department published a notice of ''Opportunity to Request Administrative Review'' of the antidumping duty order on certain cased pencils from the PRC covering the period of review (''POR'') December 1, 2006, through November 30, 2007. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 72 FR 67889 (December 3, 2007). On December 26, 2007, in accordance with 19 CFR 351.213(b), Shandong Rongxin Import and Export Co., Ltd. (''Rongxin''), a PRC exporter/producer, requested a review of itself. On December 31, 2007, the following exporters/producers requested reviews of themselves in accordance with 19 CFR 351.213(b): China First Pencil Co., Ltd. (''China First''), Shanghai Three Star Stationery Industry Corp. (''Three Star''), and Oriental International Holding Shanghai Foreign Trade Co., Ltd. (''SFTC''). On December 31, 2007, the petitioners [1] requested a review of the following companies: China First (including subsidiaries Shanghai First Writing Instrument Co., Ltd. (''Shanghai First''), Shanghai Great Wall Pencil Co., Ltd. (''Great Wall''), and China First Pencil Fang Zheng Co., Ltd. (''Fang Zheng''), Three Star, Guangdong Provincial Stationery & Sporting Goods Import & Export Corporation (''Guangdong''), Rongxin, Tianjin Custom Wood Processing Co., Ltd. (''Tianjin''), Beijing Dixon Stationery Company Ltd. (''Dixon''), and Anhui Import & Export Co., Ltd. (''Anhui'').

On January 28, 2008, the Department published a notice of initiation for this administrative review covering the companies listed in the requests received from interested parties. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 73 FR 4829 (January 28, 2008). On May 6, 2008, the petitioners requested that the Department conduct verification of the information the Department will rely upon in the final results of this review. On August 25, 2008, we extended the time limit for the preliminary results in this review until December 30, 2008. *See Certain Cased Pencils from the People's Republic of China: Extension of Time Limit for the Preliminary Results of the Antidumping Duty Administrative Review*, 73 FR 49993 (August 25, 2008).

Respondent Selection

Section 777A(c)(1) of the Tariff Act of the 1930, as amended (''the Act''), directs the Department to calculate individual dumping margins for each known producer or exporter of the subject merchandise. Because it was not practicable for the Department to individually examine all of the companies covered by the review, the Department limited its examination to a reasonable number of producers/exporters, accounting for the greatest possible export volume, pursuant to section 777A(c)(2)(B) of the Act. Therefore, the Department selected China First, Three Star, and Rongxin as the mandatory respondents in this review. *See* Memorandum from Alexander Montoro, International Trade Compliance Analyst, to Susan H. Kuhbach, Director of AD/CVD Operations Office 1, entitled ''Selection of Respondents for the Antidumping Duty Review of Certain Cased Pencils from the People's Republic of China,'' June 17, 2008.

Partial Rescission

On July 3, 2008, Dixon requested that the Department rescind the administrative review with respect to Dixon and certified that it had no exports, sales or entries of subject merchandise to the United States during the POR. We reviewed CBP import data and found no evidence that Dixon had any shipments of subject merchandise during the POR. *See* Memorandum from Alexander Montoro to the File, entitled ''Intent to Rescind in Part the Antidumping Duty Administrative

[1] The petitioners include Sanford L.P., Musgrave Pencil Company, RoseMoon Inc., and General Pencil Company.

Review on Certain Cased Pencils from the People's Republic of China'', August 7, 2008, (''Intent to Rescind Memo''). In addition, on July 17, 2008, we made a ''No Shipments Inquiry'' to CBP to confirm that there were no exports of subject merchandise by Dixon during the POR. We asked CBP to notify us within ten days if CBP ''has contrary information and is suspending liquidation'' of subject merchandise exported by Dixon. CBP did not reply with contrary information. The Department provided interested parties in this review until August 14, 2008, to submit comments on the Intent to Rescind Memo. No interested party submitted any comments. Accordingly, we are preliminarily rescinding this review with respect to Dixon.

Non–Market Economy Country Status

In every case conducted by the Department involving the PRC, the PRC has been treated as a non–market economy (''NME'') country. In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. *See*, *e.g.*, *Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the 2004–2005 Administrative Review and Notice of Rescission of 2004–2005 New Shipper Review*, 71 FR 66304 (November 14, 2006). None of the parties to this proceeding has contested such treatment. Accordingly, we calculated normal value (''NV'') in accordance with section 773(c) of the Act, which applies to NME countries.

Surrogate Country and Surrogate Values

Section 773(c)(1) of the Act directs the Department to base NV on the NME producer's factors of production (''FOPs''), valued in a surrogate market economy country or countries considered to be appropriate by the Department if NV cannot be determined pursuant to section 773(a) of the Act. In accordance with section 773(c)(4) of the Act, the Department valued the FOPs, to the extent possible, using the costs of the FOPs in one or more market–economy countries that are at a level of economic development comparable to that of the PRC and are significant producers of comparable merchandise. The Department determined that India, Indonesia, the Philippines, Colombia and Thailand are countries comparable to the PRC in terms of economic development. *See* Memorandum from Carole Showers, Acting Director, Office of Policy, to Susan H. Kuhbach, Director, Office 1, July 9, 2008.

On November 14, 2008, the Department solicited comments on surrogate country selection from interested parties. The Department received comments from the petitioners on November 26, 2008. On November 26, 2008, the Department also received surrogate–value information from the petitioner, China First, and Three Star. On December 5, 2008, and December 8, 2008, the Department received rebuttal factual information and comments on factor valuation from the petitioners and China First and Three Star (''China First–Three Star''), respectively. For a detailed discussion of the Department's selection of surrogate values and financial ratios, *see* ''Factor Valuations'' section below. *See also* Memorandum from the Team to the File, entitled ''2006–2007 Antidumping Duty Administrative Review of Certain Cased Pencils from the People's Republic of China: Factor Valuation for the Preliminary Results'', December 30, 2008, (''Factor Valuation Memorandum''), which is on file in the Central Records Unit (''CRU'') in Room 1117 of the main Department of Commerce building.

We determined that India is comparable to the PRC in terms of per capita gross national product and the national distribution of labor. Furthermore, India is a significant producer of comparable merchandise. *See* Memorandum from Alexander Montoro to the File entitled, ''2006–2007 Antidumping Duty Administrative Review on Certain Cased Pencils from the People's Republic of China: Selection of a Surrogate Country,'' December 30, 2008.

Moreover, it is the Department's practice to select an appropriate surrogate country based on the availability and reliability of data from these countries. *See* Department Policy Bulletin No. 04.1: Non–Market Economy Surrogate Country Selection Process, dated March 1, 2004. The Department finds India to be a reliable source for surrogate values because India is at a comparable level of economic development pursuant to section 773(c)(4) of the Act, is a significant producer of comparable merchandise, and has publicly available and reliable data. Furthermore, the Department notes that India has been the primary surrogate country in past segments, and the only surrogate value data submitted on the record are from Indian sources. Given the above facts, the Department has selected India as the primary surrogate country for this review.

Scope of the Order

Imports covered by the order are shipments of certain cased pencils of any shape or dimension (except as described below) which are writing and/or drawing instruments that feature cores of graphite or other materials, encased in wood and/or man–made materials, whether or not decorated and whether or not tipped (*e.g.*, with erasers, etc.) in any fashion, and either sharpened or unsharpened. The pencils subject to the order are currently classifiable under subheading 9609.10.00 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Specifically excluded from the scope of the order are mechanical pencils, cosmetic pencils, pens, non–cased crayons (wax), pastels, charcoals, chalks, and pencils produced under U.S. patent number 6,217,242, from paper infused with scents by the means covered in the above–referenced patent, thereby having odors distinct from those that may emanate from pencils lacking the scent infusion. Also excluded from the scope of the order are pencils with all of the following physical characteristics: (1) length: 13.5 or more inches; (2) sheath diameter: not less than one-and-one quarter inches at any point (before sharpening); and (3) core length: not more than 15 percent of the length of the pencil.

In addition, pencils with all of the following physical characteristics are excluded from the scope of the order: novelty jumbo pencils that are octagonal in shape, approximately ten inches long, one inch in diameter before sharpening, and three-and-one eighth inches in circumference, composed of turned wood encasing one-and-one half inches of sharpened lead on one end and a rubber eraser on the other end.

Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Affiliation – China First and Three Star

To the extent that section 771(33) of the Act does not conflict with the Department's application of separate rates and enforcement of the NME provision, section 773(c) of the Act, the Department will determine that exporters and/or producers are affiliated if the facts of the case support such a finding.[2] For the reasons discussed

[2] *See*, *e.g.*, *Certain Preserved Mushrooms From the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 64930, 64934 (November 6, 2006) (unchanged in the final results, 72 FR 44827 (August 9, 2007)), and *Certain Preserved Mushrooms From the People's Republic of China: Preliminary Results and Partial Rescission of Fifth Antidumping Duty*

below, we find that this condition has not prevented us from examining in this administrative review whether China First and its subsidiary producers[3] are affiliated with Three Star.

In prior administrative reviews involving China First and Three Star, the Department found China First to be affiliated with Three Star as a result of Shanghai Light Industry, Ltd.'s (''SLI'') direct oversight and control over both China First and Three Star.[4]

In this review, as in past administrative reviews, China First and Three Star claim that they are not affiliated and should not be collapsed. These respondents contend that SLI's transfer of its oversight responsibilities for China First and Three Star to the Huangpu District State Assets Administration Office (''HSAAO'') on October 11, 2005, and September 8, 2005, respectively, is additional evidence of their non–affiliation.[5]

Based on our analysis, we preliminarily find that China First and its pencil–producing subsidiaries are affiliated with Three Star, pursuant to section 771(33)(F) of the Act, because of the common control exercised by HSAAO. *See* Memorandum From Team to Susan H. Kuhbach, Director, Office 1, entitled ''Certain Cased Pencils from the People's Republic of China: Whether to Continue To Collapse China First and its Pencil–Producing Subsidiaries with Three Star,'' December 30, 2008 (''Affiliation/Collapsing Memo''). The basis of our finding is that the facts have not changed from previous reviews in which we found these parties to be affiliated.

In the four most recent administrative reviews of Pencils from China, the Department found China First and Three Star to be affiliated, in large part based on: (1) a 1997 public filing by China First that indicated that China First's shareholders voted to merge with Three Star; and (2) common oversight of the two firms by SLI, a government–owned assets management entity. Throughout the four reviews, both companies consistently asserted that the 1997 merger was not implemented and that the two companies, are in, fact unaffiliated competitors. However, neither China First nor Three Star was able to document that the 1997 shareholder decision to merge was reversed.

In this review, China First and Three Star continue to claim that the merger was never completed, but have yet to provide documents specifically supporting this claim. The only change is the transfer of SLI's administrative oversight of China First and Three Star to HSAAO. China First and Three Star describe the oversight duties and asset management of HSAAO to be essentially the same as those of SLI. Therefore, we preliminarily determine that common control of China First and Three Star continues and that they are affiliated under section 771(33)(F) of the Act.

The Department intends to obtain additional information on the relationship of these companies for consideration in the final results.

Collapsing – China First and Three Star

Pursuant to 19 CFR 351.401(f), the Department will collapse producers and treat them as a single entity where (1) those producers are affiliated, (2) the producers have production facilities for producing similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities, and (3) there is a significant potential for manipulation of price or production. We also note that the rationale for collapsing, to prevent manipulation of price and/or production (*see* 19 CFR 351.401(f)), applies to both producers and exporters, if the facts indicate that producers of like merchandise are affiliated as a result of their mutual relationship with an exporter.

To the extent that this provision does not conflict with the Department's application of separate rates and enforcement of the NME provision, section 773(c) of the Act, the Department will collapse two or more affiliated entities in a case involving an NME country if the facts of the case warrant such treatment. Furthermore, we note that the factors listed in 19 CFR 351.401(f)(2) are not exhaustive in the context of an NME investigation or administrative review, other factors unique to the relationship of business entities within the NME may lead the Department to determine that collapsing is either warranted or unwarranted, depending on the facts of the case. *See Hontex Enterprises, Inc. v. United States*, 248 F. Supp. 2d 1323, 1342 (Ct. Int'l. Trade 2003) (noting that the application of collapsing in the NME context may differ from the standard factors listed in the regulation).

In summary, if there is evidence of significant potential for manipulation or control between or among producers which produce similar and/or identical merchandise, but may not all produce their product for sale to the United States, the Department may find such evidence sufficient to apply the collapsing criteria in an NME context in order to determine whether all or some of those affiliated producers should be treated as one entity. *See, e.g., Mushrooms Fifth Review Prelim*, 70 FR at 10971 (unchanged in final results, 70 FR 54361 (September 14, 2005)); and *Certain Preserved Mushrooms From the People's Republic of China: Final Results of Sixth Antidumping Duty New Shipper Review and Final Results and Partial Rescission of the Fourth Antidumping Duty Administrative Review*, 69 FR 54635, 54637 (September 9, 2004), and accompanying Issues and Decision Memorandum at Comment 1.

As noted above in the ''Affiliation – China First and Three Star'' section of this notice, we find a sufficient basis to conclude that China First and its pencil–producing subsidiaries and Three Star are affiliated through the common control by HSAAO, pursuant to section 771(33)(F) of the Act. All of China First's three pencil–producing subsidiaries and Three Star produced cased pencils during the POR, which would be subject to the antidumping duty order if this merchandise entered the United States (*see* FOP data submitted by China First and Three Star in their section D responses, August 18, 2008). Therefore, we find that the first and second collapsing criteria are met because in addition to being affiliated, these producers have production facilities for producing similar or identical products, such that no retooling at any of the three facilities is required in order to restructure manufacturing priorities.

Finally, we find that the third collapsing criterion is met in this case because, a significant potential for manipulation of price or production exists among China First and Three Star. In determining whether a significant potential for manipulation exists, the regulations provide that the Department may consider various factors, including (1) the level of common ownership, (2) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm, and (3) whether the operations of the affiliated firms are intertwined. *See Gray Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative*

Administrative Review, 70 FR 10965, 10969 (March 7, 2005) (''*Mushrooms Fifth Review Prelim*'') (unchanged in the final results, 70 FR 54361 (September 14, 2005)).

[3] China First's pencil-producing subsidiaries include the following companies: Shanghai First, Great Wall, and Fang Zheng.

[4] *See, e.g., Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*,71 FR 38366 (July 6, 2006) and accompanying Issues and Decision Memorandum at Comment 7.

[5] *See* page 2 of Three Star's section A response, and pages A-4 and A-5 of China First's section A response, August 1, 2008.

Review, 63 FR 12764, 12774 (March 16, 1998) and *Notice of Final Determination of Sales at Less Than Fair Value: Collated Roofing Nails From Taiwan*, 62 FR 51427, 51436 (October 1, 1997). *See* Affiliation/Collapsing Memo for further discussion. In this case, there is a significant potential for manipulation of price or production because China First and Three Star have common ownership as demonstrated by the fact that HSAAO has administrative oversight over both of them.

For the reasons explained more fully in the Affiliation/Collapsing Memo and pursuant to 19 CFR 351.401(f), we have preliminarily collapsed China First and its pencil–producing subsidiaries with Three Star.

Separate Rates Determination

A designation as an NME remains in effect until it is revoked by the Department. *See* section 771(18)(c) of the Act. Accordingly, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assessed a single antidumping duty deposit rate (*i.e.*, a country–wide rate). *See Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China*, 71 FR 53079 (September 8, 2006); *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 FR 29303 (May 22, 2006).

It is the Department's standard policy to assign all exporters of the merchandise subject to review in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (de jure) and in fact (de facto), with respect to exports. To establish whether a company is sufficiently independent to be entitled to a separate, company–specific rate, the Department analyzes each exporting entity in an NME country under the test established in *Final Determination of Sales at Less than Fair Value: Sparklers From the People's Republic of China*, 56 FR 20588 (May 6, 1991) (''*Sparklers*''), as amplified by *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China*, 59 FR 22585 (May 2, 1994) (''*Silicon Carbide*'').

Regarding the mandatory respondents, China First and Three Star are a joint stock limited company and a company ''owned by all of the people,'' respectively.[6] A portion of China First's shares are held in trust in part by HSAAO, which is also owned by ''all of the people.''[7] HSAAO, as trustee, has oversight over Three Star's assets. As discussed above in the ''Collapsing–China First and Three Star'' section of this notice, we are preliminarily treating China First and Three Star as a collapsed entity. Consequently, we are considering whether the collapsed entity as a whole is entitled to a separate rate. This decision is specific to the facts presented in this review and is based on several considerations, including the structure of the collapsed entity, the level of control between/among affiliates, and the level of participation by each affiliate in the proceeding. Given the unique relationships which arise in NMEs between individual companies and the government, a separate rate will be granted to the collapsed entity only if the facts, taken as a whole, support such a finding.

The other mandatory respondent, Rongxin, is a limited liability company.

Five respondents subject to this review were not selected as mandatory respondents.[8] We issued separate rate applications and certifications to all five of these companies. One of these respondents, Dixon, requested rescission on the basis that it had no shipments in the POR, as discussed above. SFTC filed its separate rate certification on July 24, 2008. The remaining three non–mandatory respondents did not submit either a separate rates certification or application. One of these three companies, Tianjin, qualified for a separate rate in an earlier administrative review. *See Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 68 FR 43082, 43084 (July 21, 2003). However, because Tianjin did not submit a separate rate certification in the instant review, it will now be treated as part of the PRC–wide entity. Consequently, Anhui, Guangdong, and Tianjin have not satisfied the criteria for separate rates for the POR and are considered as being part of the PRC–wide entity.

Our analysis of whether the export activities of Rongxin, the China First/Three Star collapsed entity, and SFTC are independent from government control follows.

Absence of *De Jure* Control

The Department considers the following criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated with the individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of companies. *See Sparklers*, 56 FR at 20589.

The China First Three Star collapsed entity and Rongxin have placed on the administrative record the following documents to demonstrate absence of *de jure* control: the 1994 ''Foreign Trade Law of the People's Republic of China;'' the ''Company Law of the PRC,'' effective as of July 1, 1994; and ''The Enterprise Legal Person Registration Administrative Regulations,'' promulgated on June 13, 1988. In other cases involving products from the PRC, these and other respondents have submitted the following additional documents to demonstrate absence of *de jure* control, and the Department has placed these additional documents on the record of this segment, as well: the ''Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People,'' adopted on April 13, 1988; and the 1992 ''Regulations for Transformation of Operational Mechanisms of State–Owned Industrial Enterprises.'' *See* December 30, 2008, memorandum to the file which places the above–referenced laws on the record of this segment.

In its separate rates certification, SFTC certified that during the POR: (1) as with the segment of the proceeding in which the firm was previously granted a separate rate (''previous Granting Period''), there were no government laws or regulations that controlled the firm's export activities; (2) the ownership under which the firm registered itself with the official government business license issuing authority remains the same as for the previous Granting Period; (3) the firm had a valid PRC Export Certificate of Approval, now referred to and labeled as a Registration Form for Foreign Trade Operator; (4) as in the previous Granting Period, in order to conduct export activities, the firm was not required by any level of government law or regulation to possess additional certificates or other documents related to the legal status and/or operation of its business beyond those discussed above; and (5) PRC government laws and legislative enactments applicable to SFTC remained the same as in the

[6] *See* page A-2 of China First's August 1, 2008, Section A Response and page 2 of Three Star's August 1, 2008 Section A Response.

[7] *See* page A-5 of China First's August 1, 2008, Section A Response.

[8] Dixon, SFTC, Anhui, Guangdong, and Tianjin.

previous Granting Period. SFTC attached copies of its business license and foreign trade operator registration form to its separate certification to document the absence of government *de jure* control.

As in prior cases, we have analyzed these laws and have found them to sufficiently establish an absence of *de jure* control of joint ventures and companies owned by ''all of the people'' absent proof on the record to the contrary. *See*, *e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China*, 60 FR 22544 (May 8, 1995) (''*Furfuryl Alcohol*''). We have no information in this proceeding that would cause us to reconsider this determination. Thus, we find that the evidence on the record supports a preliminary finding of absence of *de jure* government control for SFTC, China First–Three Star (''the China First–Three Star collapsed entity''), and Rongxin based on: (1) an absence of restrictive stipulations associated with the exporter's business license; (2) the legal authority on the record decentralizing control over the respondent, as demonstrated by the PRC laws placed on the record of this review; and (3) other formal measures by the government decentralizing control of companies.

Absence of *De Facto* Control

As stated in previous cases, there is some evidence that certain enactments of the PRC central government have not been implemented uniformly among different sectors and/or jurisdictions in the PRC. *See Silicon Carbide*, 59 FR at 22587. Therefore, the Department has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of government control which would preclude the Department from assigning separate rates.

The Department typically considers the following four factors in evaluating whether a respondent is subject to *de facto* government control of its export functions: (1) whether the export prices are set by, or subject to the approval of, a government agency; (2) whether the respondent has the authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses. *See Silicon Carbide*, 59 FR at 22586–87, and *Furfuryl Alcohol*, 60 FR at 22545.

The affiliates in the China First–Three Star collapsed entity (where applicable) and Rongxin all have asserted the following: (1) each establishes its own export prices; (2) each negotiates contracts without guidance from any government entities or organizations; (3) each makes its own personnel decisions; and (4) each retains the proceeds of its export sales, uses profits according to its business needs, and has the authority to sell its assets and to obtain loans. Additionally, each respondent's questionnaire responses indicate that its pricing during the POR was not coordinated among exporters. As a result, there is a sufficient basis to preliminarily determine that each respondent listed above (including the China First–Three Star collapsed entity as a whole) has demonstrated a *de facto* absence of government control of its export functions and is each entitled to a separate rate. Consequently, we have preliminarily determined that each of these respondents has met the criteria for the application of a separate rate. Moreover, with respect to the affiliates included in the China First–Three Star collapsed entity, we have assigned to all of them the same antidumping rate in these preliminary results for the above–mentioned reasons.

The Department also conducted a separate rates analysis for SFTC. SFTC certified the following: (1) there is no government participation in setting export prices; (2) the firm has independent authority to negotiate and sign export contracts; (3) the firm had autonomy from all levels of government in making decisions regarding the selection of management; (4) SFTC did not submit the names of its candidates for managerial positions to any governmental entity for approval; and (5) there are no restrictions on the use of export revenue. During our analysis of the information on the record, we found no information indicating the existence of government control of SFTC's export activities. *See* SFTC's submission of July 24, 2008. Consequently, we preliminarily determine that SFTC has met the criteria for the application of a separate rate.

Fair–Value Comparisons

To determine whether the respondents' sales of subject merchandise were made at less than NV, we compared the NV to individual export price (''EP'') transactions in accordance with section 777A(d)(2) of the Act. *See* ''Export Price'' and ''Normal Value'' sections of this notice, below.

Export Price

In accordance with section 772(a) of the Act, EP is ''the price at which merchandise is first sold (or agreed to be sold) before the date importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States to an unaffiliated purchaser for exportation to the United States,'' as adjusted under section 772(c) of the Act. In accordance with section 772(a) of the Act, we used EPs for sales by the China First–Three Star collapsed entity and Rongxin to the United States because the subject merchandise was sold directly to unaffiliated customers in the United States (or to unaffiliated resellers outside the United States with knowledge that the merchandise was destined for the United States) prior to importation, and constructed export price methodology was not otherwise indicated. We based EP on free–on-board port or delivered prices to unaffiliated purchasers in the United States. In accordance with section 772 (c)(2)(A) of the Act, we made deductions for movement expenses, where appropriate. Movement expenses included expenses for foreign inland freight from plant to port of exportation, foreign brokerage and handling where applicable, international freight. Foreign inland freight and foreign brokerage and handling were provided by an NME vendor and, thus, as explained in the section below, we based the amounts of the deductions for these movement charges on values from a surrogate country.

For international freight, we used the reported expenses because the respondents used market–economy freight carriers and/or paid for those expenses in a market–economy currency. For certain sales, Rongxin used a market–economy carrier, which it paid in U.S. dollars. In China First–Three Star's case, it used an NME carrier, but paid for the services in a market–economy currency. All of the respondents reported that they incurred no marine insurance expenses on their sales to the United States. For a detailed description of all adjustments, *see* Memorandum from Nancy Decker, Program Manager, Office 1, to the File entitled ''Analysis for the Preliminary Results of Antidumping Duty Administrative Review of Certain Cased Pencils from the People's Republic of China: China First Pencil Company, Ltd., Shanghai Three Star Stationery Industry Corp.'' (''China First–Three Star Preliminary Calculation Memorandum''), December 30, 2008, and ''Analysis for the Preliminary

Results of Antidumping Duty Administrative Review of Certain Cased Pencils from the People's Republic of China: Shandong Rongxin Import and Export Co. Ltd.'' (''Rongxin Preliminary Calculation Memorandum''), December 30, 2008.

We valued brokerage and handling using a simple average of the brokerage and handling costs that were reported in public submissions that were filed in three antidumping duty cases. Specifically, we averaged the public brokerage and handling expenses reported by: Agro Dutch Industries Ltd. in the antidumping duty administrative review of certain preserved mushrooms from India; Kejirwal Paper Ltd. in the less than fair value investigation of certain lined paper products from India; and Essar Steel in the antidumping duty administrative review of hot–rolled carbon steel flat products from India. *See Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review*, 71 FR 10646 (March 2, 2006); *see also Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances in Part: Certain Lined Paper Products From India, 71 FR 19706 (April 17, 2006) (unchanged in final results*, 71 FR 45012 (August 8, 2006)), and *Certain Hot–Rolled Carbon Steel Flat Products From India: Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 2018, 2021 (January 12, 2006) (unchanged in final results, 71 FR 40694 (July 18, 2006)). We identify the source used to value foreign inland freight in the ''Normal Value'' section of this notice, below. We adjusted these values, as appropriate, to account for inflation or deflation between the effective period and the POR. We calculated the inflation or deflation adjustments for these values using the wholesale price indices (''WPI'') for India as published in the *International Financial Statistics* (''IFS'') *Online Service* maintained by the Statistics Department of the International Monetary Fund at the website *http://www.imfstatistics.org*.

Normal Value

Section 773(c)(1) of the Act provides that the Department shall determine NV using an factor of production (''FOP'') methodology if the merchandise is exported from an NME country and the information does not permit the calculation of NV using home–market prices, third–country prices, or constructed value under section 773(a) of the Act.

The Department will base NV on FOPs because the presence of government controls on various aspects of these NME economies renders price comparisons and the calculation of production costs invalid under our normal methodologies. Therefore, we calculated NV based on FOPs in accordance with sections 773(c)(3) and (4) of the Act and 19 CFR 351.408(c). The FOPs include: (1) hours of labor required; (2) quantities of raw materials employed; (3) amounts of energy and other utilities consumed; and (4) representative capital costs. We used the FOPs reported by respondents for materials, energy, labor, and packing.

In accordance with 19 CFR 351.408(c)(1), when a producer sources an input from a market–economy (''ME'') country and pays for it in ME currency, the Department will normally value the factor using the actual price paid to the market–economy supplier for the input. *See* 19 CFR 351.408(c)(1). Where a portion of the input is purchased from a market–economy supplier and the remainder from an NME supplier, the Department will normally use the price paid for the input sourced from market–economy suppliers to value all of the input, provided the volume of the market–economy input as a share of total purchases from all sources is ''meaningful.'' *See Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27366 (May 19, 1997); *Shakeproof v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001); 19 CFR 351.408(c)(1); *see also Antidumping Methodologies: Market Economy Inputs, Expected Non–Market Economy Wages, Duty Drawback; and Request for Comments*, 71 FR 61716, 61716–61719 (October 19, 2006) regarding the Department's flexible 33 percent threshold for market economy inputs. In this administrative review, Three Star, one of the companies in the collapsed China First–Three Star entity, reports purchasing four market economy inputs. However, the volume of three of the four market economy purchases did not exceed the threshold percentage that the Department normally considers ''meaningful'' when these purchases were compared to the combined NME purchases of the same inputs by the collapsed Chin First–Three Star entity. *See* China First–Three Star Preliminary Calculation Memorandum.

With regard to both the Indian import–based surrogate values and the ME input values, we have disregarded prices that we have reason to believe or suspect may be subsidized. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of 1999–2000 Administrative Review, Partial Rescission of Review, and Determination Not To Revoke Order in Part*, 66 FR 57420 (November 15, 2001), and accompanying Issues and Decision Memorandum at Comment 1. We have found that India, Indonesia, South Korea, and Thailand maintain broadly available, non–industry-specific export subsidies, and it is reasonable to infer that exports to all markets from these countries may be subsidized. *See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review*, 70 FR 54007, 54011 (September 13, 2005) (unchanged in final results, 71 FR 14170 (March 21, 2006)); and *China Nat'l Machinery Import & Export Corp. v. United States*, 293 F. Supp. 2d 1334, 1336 (Ct. Int'l. Trade 2003), *aff'd* 104 Fed. App 183 (Fed. Cir. 2004).

In avoiding the use of prices that may be subsidized, the Department does not conduct a formal investigation to ensure that such prices are not subsidized. *See* H.R. Rep. 100–576 at 590–91 (1988), *reprinted* in 1988 U.S.C.C.A.N. 1547, 1623. Rather, the Department bases its decision on information that is available to it at the time it is making its determination. Therefore, we have not used prices from these countries either in calculating the Indian import–based surrogate values or in calculating ME input values. *See* Factor Valuation Memorandum.

Factor Valuations

In accordance with section 773(c)(3) of the Act, we calculated NV based on FOPs reported by the respondents for the POR. We multiplied the reported per–unit factor quantities by publicly available Indian surrogate values. In selecting the surrogate values, we considered the quality, specificity, and contemporaneousness of the data.

In accordance with section 773(c)(1) of the Act, for purposes of calculating NV, we attempted to value the FOPs using surrogate values that were in effect during the POR. If we were unable to obtain surrogate values that were in effect during the POR, we adjusted the values, as appropriate, to account for inflation or deflation between the effective period and the POR. We calculated the inflation or deflation adjustments for all factor values, as applicable, except labor, using the WPI for the appropriate surrogate country as published in the IFS.

As appropriate, we adjusted input prices by including freight costs to make them delivered prices. Specifically, we

added to the Indian import surrogate values a surrogate freight cost calculated using the shorter of the reported distance from the domestic supplier to the factory or the distance from the nearest port of export to the factory where appropriate (*i.e.*, where the sales terms for the ME inputs were not delivered to the factory). This adjustment is in accordance with the decision of the Court of Appeals for the Federal Circuit in *Sigma Corp. v. United States*, 117 F.3d 1401 (Fed. Cir. 1997). We valued the FOPs as follows:

(1) Except where noted below, we valued all reported material, energy, and packing inputs using Indian import data from the World Trade Atlas (''WTA'') for December 2006 through November 2007.

(2) To value lindenwood pencil slats, we used publicly available, published U.S. prices for American basswood lumber because price information for Chinese lindenwood and American basswood is not available from any of the potential surrogate countries.[9] The U.S. lumber prices for basswood for the period December 1, 2006, through November 30, 2007.are published in the Hardwood Market Report. We intend to obtain additional information on this issue after the preliminary results. For further discussion *see* Factor Valuation Memorandum.

(3) The China First–Three Star collapsed entity reported that some of its purchases of specific inputs were sourced from ME countries and paid for in ME currencies. Pursuant to 19 CFR 351.408(c)(1), we used the actual price paid by the China First–Three Star collapsed entity for one of these inputs. Where applicable, we also adjusted these values to account for freight costs incurred between the supplier and respondent. *See* Factor Valuation Memorandum, Analysis *for the Preliminary Results of the Antidupming Duty Administrative Review of Certain Cased Pencils from the People's Republic of China: China First Pencil Company, Ltd. (''China First'') and Shanghai Three Star Stationery Industry Corp. (''Three Star'')*, December 30, 2008, and *Analysis for the Preliminary Results of the Antidupming Duty Administrative Review of Certain Cased Pencils from the People's Republic of China: Shandong Rongxin Import & Export Co. (''Rongxin'')*., December 30, 2008. As noted above, we found that the ME purchases of the other three inputs reported by the China First–Three Star collapsed entity did not account for a high enough percentage of the collapsed entity's total purchases of those inputs to be meaningful.

(4) We valued electricity using price data for small, medium, and large industries, as published by the Central Electricity Authority of the Government of India in its publication titled ''Electricity Tariff & Duty and Average Rates of Electricity Supply in India,'' dated July 2006. These electricity rates represent actual country–wide, publicly–available information on tax–exclusive electricity rates charged to industries in India. Since the rates are not contemporaneous with the POI, we inflated the values using the WPI. *See* Factor Valuation Memorandum.

(5) We valued steam using the data as calculated by the Department in the *Certain New Pneumatic Off–The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*,73 FR 40485 (July 15, 2008) and accompanying Issues and Decision Memorandum at Comment 11. We adjusted this value, as appropriate, to account for inflation between the effective period and the POR.

(6) Section 351.408(c)(3) of the Department's regulations requires the use of a regression–based wage rate. Therefore, we valued labor using the regression–based wage rate for China published on IA's website. The source of the wage rate data on the Import Administration's website is the International Labour Organization (''ILO''), Geneva, Labour Statistics Database Chapter 5B: Wages in Manufacturing. *See* Expected Wages of Selected NME Countries (revised November 2008) (available at *http://ia.ita.doc.gov/wages/index.html*). Since this regression–based wage rate does not separate the labor rates into different skill levels or types of labor, we have applied the same wage rate to all skill levels and types of labor.

(7) We derived ratios for factory overhead, depreciation, and selling, general and administrative expenses, interest expenses, and profit for the finished product using the 2006–2007 (''FY 06–07 FS'') financial statement of Triveni Pencils Ltd. (''Triveni''), an Indian producer of pencils, in accordance with the Department's practice with respect to selecting financial statements for use in NME cases (*see*, *e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates From the People's Republic of China*, 70 FR 24502 (May 10, 2005), and accompanying Issues and Decision Memorandum at Comment 2). The Department prefers to derive financial ratios using data from those surrogate producers whose financial data will not be distorted or otherwise unreliable.

In prior reviews of this product, the Department derived the surrogate financial ratios from the financial statement of Camlin Ltd. (''Camlin''), an Indian producer of pencils and other products. *See*, *e.g.*, *Certain Cased Pencils From the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 70949 (December 7, 2006) (''*Prelim PRC Pencils 2004–2005 AR*'') (unchanged in the final results, 72 FR 27074 (May 14, 2007)). However, we have used Triveni's FY 06–07 FS for purposes of the preliminary results of this review because Triveni pencils, whereas Camlin produces pencils and an array of other art supplies. Because of this, Triveni is a better match with our Chinese respondents who also primarily produce pencil producers. Consequently, we find Triveni's FY 06–07 report to be more reliable and less distortive than Camlin's financial data. In addition, India is our primary surrogate country and Triveni is an Indian producer of the subject merchandise. Therefore, for both the China First–Three Star collapsed entity and Rongxin, we have applied the ratios taken from Triveni's FY 06–07 FS statement to the respondents' calculated costs for materials, labor, and energy.

(8) We valued inland truck freight expenses using a per–unit average

[9] In the antidumping investigation of certain cased pencils from the PRC, the Department found Chinese lindenwood and American basswood to be virtually indistinguishable and thus used U.S. prices for American basswood to value Chinese lindenwood. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils From the People's Republic of China*, 59 FR 55625, 55632 (November 8, 1994). This methodology was upheld by the Court of International Trade. *See Writing Instrument Mfrs. Ass'n Pencil Section, et. al. v. United States*, 984 F. Supp. 629, 639 (Ct. Int'l. Trade 1997), aff'd 178 F.3d 1311 (Fed. Cir. 1998).

rate calculated from data on the following website: http://www.infobanc.com/logistics/logtruck.htm. The logistics section of this website contains inland freight truck rates between many large Indian cities. For certain Rongxin sales where inland freight was provided by ''ferry,'' we were unable to find sufficiently recent barge rates and, therefore, we substituted inland truck rates. *See* Factor Valuation Memorandum. Since the truck rate value is not contemporaneous with the POI, we deflated the rate using WPI. For Rongxin we used 2006–2007 data from the website www.Indianrailways.gov to derive, where appropriate, input–specific train rates on a rupees per kilogram per kilometer basis(≥Rs/kg/km''). Rongxin also reported transportation by cart for one input which we disregarded because the distance involved was insignificant. *See* China First–Three Star Preliminary Calculation Memorandum. For further discussion of the surrogate values we used for these preliminary results of review, see the Factor Valuation Memorandum, which is on file in the Central Records Unit (''CRU'') in Room 1117 of the main Department of Commerce building.

Currency Conversion

We made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank.

Preliminary Results of Review

We preliminarily determine that the following margins exist for the period December 1, 2006, through November 30, 2007:

Manufacturer/exporter	Margin (percent)
China First Pencil Company, Ltd. (which includes its affiliates China First Pencil Fang Zheng Co., Shanghai First Writing Instrument Co., Ltd., and Shanghai Great Wall Pencil Co., Ltd.), and Shanghai Three Star Stationery Industry Corp.[10]	33.26
Shandong Rongxin Import & Export Co., Ltd.	8.53
Orient International Holding Shanghai Foreign Trade Co., Ltd.	20.90
PRC–wide Entity[11]	114.90

[10] For this review, we consider China First Pencil Company, Ltd., China First Pencil Fang Zheng Co., Shanghai First Writing Instrument Co., Ltd., Shanghai Great Wall Pencil Co., Ltd., and Shanghai Three Star Stationery Industry Corp. to constitute a single entity as stated on page A-1 of China First's August 1, 2008, Section A Response.

[11] The PRC-wide entity includes Anhui Import Export Co., Ltd., Guangdong Provincial Stationeryand Sporting Goods Import Export Corporation, and Tianjin Custom Wood Processing Co., Ltd.

As stated above in the ''Separate–Rates Determination'' section of this notice, SFTC qualifies for a separate rate in this review. Moreover as stated above in the ''Respondent Selection'' section of this notice, we limited this review by selecting the largest exporters and did not select SFTC as a mandatory respondent. Therefore, SFTC is being assigned a dumping margin based on the calculated margins of mandatory respondents which are not *de minimis* or based on adverse facts available, in accordance with Department practice. Accordingly, we have assigned SFTC the simple–average of the dumping margins assigned to the China First–Three Star collapsed entity and Rongxin.

The Department will disclose calculations performed for these preliminary results to the parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

In accordance with 19 CFR 351.301(c)(3)(ii), for the final results of this administrative review, interested parties may submit publicly available information to value FOPs within 20 days after the date of publication of these preliminary results. Interested parties must provide the Department with supporting documentation for the publicly available information to value each FOP. Additionally, in accordance with 19 CFR 351.301(c)(1), for the final results of this administrative review, interested parties may submit factual information to rebut, clarify, or correct factual information submitted by an interested party less than ten days before, on, or after, the applicable deadline for submission of such factual information. However, the Department notes that 19 CFR 351.301(c)(1) permits new information only insofar as it rebuts, clarifies, or corrects information recently placed on the record. The Department generally cannot accept the submission of additional, previously absent–from-the–record alternative surrogate value information pursuant to 19 CFR 351.301(c)(1). *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, in Part*, 72 FR 58809 (October 17, 2007) and accompanying Issues and Decision Memorandum at Comment 2.

An interested party may request a hearing within 30 days of publication of the preliminary results. *See* 19 CFR 351.310(c). Interested parties may submit written comments (case briefs) within seven days of issuance of the verification report and rebuttal comments (rebuttal briefs), which must be limited to issues raised in the case briefs, within five days after the time limit for filing case briefs. *See* 19 CFR 351.309(c)(1)(ii) and 19 CFR 351.309(d). Parties who submit arguments are requested to submit with the argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities. Further, the Department requests that parties submitting written comments provide the Department with a diskette containing the public version of those comments. We will issue a memorandum identifying the date of a hearing, if one is requested.

The Department will issue the final results of this administrative review, including the results of our analysis of the issues raised by the parties in their comments, within 120 days of publication of the preliminary results, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon completion of this administration review, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review. Pursuant to 19 CFR 351.212(b)(1), we will calculate importer- or customer–specific *ad valorem* duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales. To determine whether the duty assessment rates are *de minimis* (*i.e.*, less than 0.50 percent), in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we will calculate customer–specific *ad valorem* ratios based on export prices.

We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any importer- or customer–specific assessment rate calculated in the final

results of this review is above *de minimis*.

For entries of the subject merchandise during the POR from companies not subject to this review, we will instruct CBP to liquidate them at the cash deposit rate in effect at the time of entry. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

For the China First–Three Star collapsed entity and Rongxin, we have calculated customer–specific antidumping duty assessment amounts for subject merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total quantity of sales examined. We calculated these assessment amounts because there is no information on the record which identifies entered values or the importers of record for the U.S. sales of the China First–Three Star collapsed entity and Rongxin.

As noted above, SFTC, the company that met the separate rate application status, will be assigned the simple–average dumping margin based on the calculated margins of mandatory respondents which are not *de minimis* or based on adverse facts available, in accordance with Department practice. We will instruct CBP to assess antidumping duties on this company's entries equal to the margin this company receives in the final results, regardless of the importer or customer.

The other three companies, Anhui, Guangdong and Tianjin, did not provide separate rate information. Therefore, the Department finds that they are not entitled to a separate rate. As a result, these three companies will be considered part of the PRC–wide entity, subject to the PRC–wide rate.

For Dixon, for which this review is preliminarily rescinded, antidumping duties shall be assessed at rates equal to the cash–deposit of estimated. antidumping duties required at the time of entry, or withdrawal form warehouse, for consumption, in accordance with 19 CFR 351.212(c)(2).

Cash Deposit Requirements

The following cash–deposit requirements will apply to all shipments of certain cased pencils from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(1) of the Act: (1) the cash deposit rates for the reviewed companies named above will be the rates for those firms established in the final results of this administrative review; (2) for any previously reviewed or investigated PRC or non–PRC exporter, not covered in this review, with a separate rate, the cash deposit rate will be the company–specific rate established in the most recent segment of this proceeding; (3) for all other PRC exporters, the cash deposit rate will be the PRC–wide rate established in the final results of this review; and (4) the cash–deposit rate for any non–PRC exporter of subject merchandise from the PRC will be the rate applicable to the PRC exporter that supplied that exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Interested Parties

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing the preliminary results determination in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 30, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E9–00062 Filed 1–6–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–489–805]

Notice of Initiation of Antidumping Duty Changed Circumstances Review: Certain Pasta From Turkey

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to a request from Marsan Gida Sanayi ve Ticaret A.S. (Marsan), a producer of pasta, pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.216 and 351.221(c)(3), the Department is initiating a changed circumstances review of the antidumping duty order on certain pasta (pasta) from Turkey. This review is being conducted to determine whether Marsan is the successor-in-interest to Gidasa Sabanci Gida Sanayi ve Ticaret A.S. (Gidasa) for purposes of determining antidumping duty liability.

DATES: *Effective Date:* January 7, 2009.

FOR FURTHER INFORMATION CONTACT: Christopher Hargett, Office of AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4161.

Background

On July 24, 1996, the Department published in the **Federal Register** the antidumping duty order on pasta from Turkey. *See Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value: Certain Pasta From Turkey,* 61 FR 38545 (July 24, 1996) (*Pasta from Turkey Order*). On December 3, 2008, Marsan filed a request for an expedited changed circumstances review to determine whether it is the successor-in-interest to Gidasa, in accordance with section 751(b) of the Act and 19 CFR 351.216. Marsan submitted certain information in support of its claim that it is the successor-in-interest to Gidasa and, therefore, is entitled to Guidasa's current antidumping duty cash deposit rate of 0.29 percent.[1]

Scope of the Order

Imports covered by this review are shipments of certain non-egg dry pasta in packages of five pounds (2.27 kilograms) or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastases, vitamins, coloring and flavorings, and up to two percent egg white. The pasta covered by this scope is typically sold in the retail market, in fiberboard or cardboard cartons, or polyethylene or polypropylene bags of varying dimensions.

Excluded from the scope of this review are refrigerated, frozen, or canned pastas, as well as all forms of egg pasta, with the exception of non-egg dry pasta containing up to two percent egg white.

The merchandise subject to review is currently classifiable under item 1902.19.20 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is

[1] *See Notice of Final Results of Antidumping Duty Administrative Review: Certain Pasta from Turkey,* 64 FR 69493 (December 13, 1999); *see also Notice of Final Results of Changed Circumstances Antidumping and Countervailing Duty Administrative Reviews: Certain Pasta From Turkey,* 68 FR 41554 (July 14, 2003).

provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.

Initiation of Antidumping Duty Changed Circumstances Review

Pursuant to section 751(b)(1) of the Act, the Department will conduct a changed circumstances review upon receipt of a request from an interested party or receipt of information concerning an antidumping duty order which shows changed circumstances sufficient to warrant a review of the order. On December 3, 2008, Marsan submitted its request for an expedited changed circumstances review. With its request, Marsan submitted certain information related to its claim that Gidasa changed its name to Marsan, including information describing the acquisition of Gidasa by MGS Marmara Gida Sanayi ve Ticaret A.S. Based on the information Marsan submitted, the Department has determined that changed circumstances sufficient to warrant a review exist. *See* 19 CFR 351.216(d). In antidumping duty changed circumstances reviews involving a successor-in-interest determination, the Department typically examines several factors including, but not limited to, changes in: (1) Management; (2) production facilities; (3) supplier relationships; and (4) customer base. *See Brass Sheet and Strip from Canada: Final Results of Antidumping Duty Administrative Review,* 57 FR 20460, 20462 (May 13, 1992) and *Certain Cut-To-Length Carbon Steel Plate from Romania: Initiation and Preliminary Results of Changed Circumstances Antidumping Duty Administrative Review,* 70 FR 22847 (May 3, 2005) (*Plate from Romania*), unchanged in *Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Cut-to-Length Carbon Steel Plate from Romania,* 70 FR 35624 (June 21, 2005). While no single factor or combination of factors will necessarily be dispositive, the Department generally will consider the new company to be the successor to the predecessor company if the resulting operations are essentially the same as those of the predecessor company. *See, e.g., Industrial Phosphoric Acid from Israel: Final Results of Antidumping Duty Changed Circumstances Review,* 59 FR 6944, 6945 (February 14, 1994), and *Plate from Romania,* 70 FR 22847. Thus, if record evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the predecessor company, the Department may assign the successor company the cash deposit rate of its predecessor. *See, e.g., Fresh and Chilled Atlantic Salmon from Norway: Final Results of Changed Circumstances Antidumping Duty Administrative Review,* 64 FR 9979, 9980 (March 1, 1999). Although Marsan submitted documentation related to its name change and some limited information regarding the four factors that the Department considers in its successor-in-interest analysis, it did not provide complete supporting documentation for the four elements listed above. Accordingly, the Department has determined that it would be inappropriate to expedite this action by combining the preliminary results of review with this notice of initiation, as permitted under 19 CFR 351.221(c)(3)(ii). Thus, the Department is not issuing the preliminary results of its antidumping duty changed circumstances review at this time.

The Department will issue questionnaires requesting additional information for the review and will publish in the **Federal Register** a notice of the preliminary results of the antidumping duty changed circumstances review, in accordance with 19 CFR 351.221(b)(2) and (4), and 19 CFR 351.221(c)(3)(i). That notice will set forth the factual and legal conclusions upon which our preliminary results are based and a description of any action proposed. Pursuant to 19 CFR 351.221(b)(4)(ii), interested parties will have an opportunity to comment on the preliminary results of review. In accordance with 19 CFR 351.216(e), the Department will issue the final results of its antidumping duty changed circumstances review not later than 270 days after the date on which the review is initiated.

During the course of this antidumping duty changed circumstances review, deposit requirements for the subject merchandise exported and manufactured by Marsan will continue to be the rate established in the antidumping duty order, as amended, for all manufacturers and exporters not investigated. *See Pasta from Turkey Order,* 61 FR 38545. The cash deposit will be altered, if warranted, pursuant only to the final results of this review.

This notice of initiation is in accordance with section 751(b)(1) of the Act, 19 CFR 351.216(b) and (d), and 19 CFR 351.221(b)(1).

Dated: December 31, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E9–70 Filed 1–6–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-549-821]

Polyethylene Retail Carrier Bags from Thailand: Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On September 30, 2008, in response to a request from an interested party, the Department of Commerce published a notice of initiation of the administrative review of the antidumping duty order on polyethylene retail carrier bags from Thailand. The period of review is August 1, 2007, through July 31, 2008. The Department of Commerce is rescinding this review in part.

EFFECTIVE DATE: January 7, 2009.

FOR FURTHER INFORMATION CONTACT: Yang Jin Chun or Richard Rimlinger, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482-5760 and (202) 482-4477, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 30, 2008, in response to a request from an interested party, the Department of Commerce (the Department) initiated the administrative review of the antidumping duty order on polyethylene retail carrier bags (PRCBs) from Thailand for the period of review August 1, 2007, through July 31, 2008. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 73 FR 56795, 56796 (September 30, 2008).

On December 9, 2008, the interested party that requested the review of C.P. Packaging Co., Ltd., C.P. Poly-Industry Co., Ltd., Naraipak Co., Ltd., and Nari Packaging (Thailand) Ltd. withdrew its request. On December 29, 2008, the interested party that requested the review of Poly Plast (Thailand) Co., Ltd., withdrew its request.

Rescission of Review

In accordance with 19 CFR 351.213(d)(i), the Department will rescind an administrative review ''if a party that requested the review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review.'' We received the letters withdrawing the requests for the review of the companies listed above within the 90-day time limit. The Department received no other requests for review of these companies. Pursuant to 19 CFR 351.213(d)(1), the Department is rescinding the review in part with respect to PRCBs from Thailand produced and/or exported by these companies. The Department will issue appropriate assessment instructions to U.S. Customs and Border Protection 15 days after publication of this notice.

Notification to Importer

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice is published in accordance with section 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: December 31, 2008.

Edward C. Yang,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E8–71 Filed 1–6–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–849]

Commodity Matchbooks From India: Postponement of Preliminary Determination in the Countervailing Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* January 7, 2009.

FOR FURTHER INFORMATION CONTACT: Sean Carey or Dana Mermelstein, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–1391 and (202) 482–3964, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 18, 2008, the Department of Commerce (the Department) initiated a countervailing duty investigation on commodity matchbooks from India. *See Commodity Matchbooks From India: Initiation of Countervailing Duty Investigation*, 73 FR 70968 (November 24, 2008). The preliminary determination is currently due no later than January 22, 2009. On December 22, 2008, D.D. Bean & Sons Co. (Petitioner), requested that the Department postpone the preliminary determination in the countervailing duty investigation on commodity matchbooks from India.

Postponement of Due Date for Preliminary Determination

Under section 703(c)(1)(A) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.205(e), the Department may extend the deadline for reaching a preliminary determination in a countervailing duty investigation until no later than the 130th day after the date on which the administering authority initiates an investigation, if the petitioner makes a timely request for an extension of the period within which the determination must be made under section 703(b) of the Act. Pursuant to 19 CFR 351.205(e), Petitioner's request for postponement of the preliminary determination was timely made 25 days or more before the scheduled date of the preliminary determination. Because the Department finds no compelling reason to deny Petitioner's request, we are postponing the due date for the preliminary determination to no later than March 30, 2009.[1]

This determination is issued and published pursuant to sections 703(c)(2) of the Act and 19 CFR 351.205(f).

Dated: December 30, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–31466 Filed 1–6–09; 8:45 am]

BILLING CODE 3510–DS–P

[1] Because the 130th day after the date of initiation is Saturday, March 28, 2009, we will issue the preliminary determination no later than the next business day (*i.e.*, Monday, March 30, 2009).

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–942]

Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce preliminarily determines that countervailable subsidies are being provided to producers and exporters of certain kitchen appliance shelving and racks from the People's Republic of China. For information on the estimated subsidy rates, see the ''Suspension of Liquidation'' section of this notice.

DATES: *Effective Date:* January 7, 2009.

FOR FURTHER INFORMATION CONTACT: Yasmin Nair or Scott Holland, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–3813 or (202) 482–1279, respectively.

SUPPLEMENTARY INFORMATION:

Case History

The following events have occurred since the publication of the Department of Commerce's (''Department'') notice of initiation in the **Federal Register**. *See Notice of Initiation of Countervailing Duty Investigation: Certain Kitchen Appliance Shelving and Racks from the People's Republic of China,* 73 FR 50304 (August 26, 2008) *(''Initiation Notice''),* and the accompanying Initiation Checklist.

On August 21, 2008, the Department requested Quantity and Value (''Q&V'') information from the 12 companies that the petitioners [1] identified as potential producers/exporters of kitchen shelving and racks in the People's Republic of China (''PRC''). On September 17, 2008, the Department selected two Chinese producers/exporters of certain kitchen appliance shelving and racks (''KASR'') as mandatory respondents, Asber Enterprise Co. (''Asber'') and

[1] The petitioners in this investigation are Nashville Wire Products Inc., SSW Holding Company, Inc., United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, and the International Association of Machinists and Aerospace Workers, District Lodge 6 (Clinton, IA) (collectively, ''the petitioners'').

Guangdong Wire King Housewares and Hardware Co., Ltd. (''Wire King''). *See* Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, ''Respondent Selection Memo'' (September 17, 2008). This memorandum is on file in the Department's Central Records Unit in Room 1117 of the main Department building (''CRU'').

On September 24, 2008, the U.S. International Trade Commission (''ITC'') issued its affirmative preliminary determination that there is a reasonable indication that an industry in the United States is materially injured by reason of allegedly subsidized imports of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China (''PRC''). *See Certain Kitchen Appliance Shelving and Racks from China,* Investigation Nos. 701–TA–458 and 731–TA–1154, 73 FR 55132 (September 24, 2008).

On September 29, 2008, the Department postponed the deadline for the preliminary determination in this investigation until December 22, 2008. *See Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Notice of Postponement of Preliminary Determination in the Countervailing Duty Investigation,* 73 FR 56550 (September 29, 2008).

On October 3, 2008, the petitioners submitted new subsidy allegations to the Department.

On October 7, 2008, we issued the countervailing duty (''CVD'') questionnaires to the Government of the People's Republic of China (''GOC''), Asber, and Wire King. On October 8, 2008, we issued a correction to the CVD Questionnaire to Asber and Wire King.

On October 23, 2008, counsel for Asber notified the Department that the company would not participate further in the investigation.

On November 18, 2008, the Department determined to investigate certain of the newly alleged subsidies, specifically those relating to the following local subsidy programs: Exemption from Land Development Fees for Enterprises Located in Industrial Cluster Zones (''ICZ''); Reduction in Farmland Development Fees for Enterprises Located in ICZ; Exemption from District and Township Level Highway Construction Fees for Enterprises Located in ICZ; Exemptions from or Reductions in Educational Supplementary Fees and Embankment Defense Fees for Enterprises Located in ICZ; Preferential Electricity Rates Charged to Enterprises Located in ICZ; Special Subsidy from the Technology Development Fund to Encourage Technology Innovation; Special Subsidy from the Technology Development Fund to Encourage Technology Development; Subsidies to Encourage Enterprises in ICZ to Hire Post-Doctoral Workers; Land Purchase Grants to Enterprises Located in ICZ and Encouraged Enterprises; Discounted Electricity Rates for Foreign-Invested Enterprises (''FIEs''); Exemption from Project Consulting Fee for FIEs; Exemption from Accommodating Facilities Fees for High-Tech and Large-Scale FIEs; Income Tax Deduction for Technology Development Expenses of FIEs; Preferential Land-Use Charges for Newly-Established, Industrial Projects in Zhongshan's Industrial Zones (''IZs''); Reduction of Land Price at the Township Level for Newly-Established, Industrial Projects in Zhongshan's IZ; Reduction in Urban Infrastructure Fee for Industrial Enterprises in IZ; Income Tax Rebate for ''Superior Industrial Enterprise'' in Zhongshan; Accelerated Depreciation for New Technological Transformation Projects ''Superior Industrial Enterprises'' in Zhongshan; Exemption from the Tax on Investments in Fixed Assets for ''Superior Industrial Enterprises'' in Zhongshan; and Preferentially-Priced Electricity for ''Superior Industrial Enterprises.'' *See* Memorandum to Susan Kuhbach, Director, AD/CVD Operations, Office 1, ''New Subsidy Allegations'' (November 18, 2008). Questionnaires regarding these newly alleged subsidies were sent to the GOC and Wire King on November 18, 2008.

We received responses to our questionnaire from the GOC and Wire King on November 20, 2008. *See* the GOC's Original Questionnaire Response (November 20, 2008) (''GQR'') and Wire King's Original Questionnaire Response (November 20, 2008) (''WKQR''). We sent supplemental questionnaires on the following dates: December 4 and December 12, 2008 (Wire King) and December 5, 2008 (GOC). We received responses to these supplemental questionnaires as follows: Wire King's First Supplemental Response on December 11, and December 15 (''WK1SR'') and Wire King's Second Supplemental Response on December 17 (''WK2SR'') and GOC's First Supplemental Response on December 11 (''G1SR'').

On November 24, December 3, December 8, and December 16, 2008, the petitioners submitted comments on the questionnaire responses filed by the GOC and Wire King.

We received responses to the new subsidy allegation questionnaires on December 9, 2008 from the GOC (''GOC NSAQR'') and Wire King (''WK NSAQR'').

On December 19, 2008, the petitioners requested that the final determination of this CVD investigation be aligned with the final determination in the companion antidumping duty (''AD'') investigation in accordance with section 705(a)(1) of the Tariff Act of 1930, as amended (the ''Act'').

The petitioners provided comments on December 16 and 17, 2008, regarding certain issues for the preliminary determination.

Scope Comments

In accordance with the preamble to the Department's regulations, we set aside a period of time in our *Initiation Notice* for parties to raise issues regarding product coverage, and encouraged all parties to submit comments within 20 calendar days of publication of that notice. *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27323 (May 19, 1997), and *Initiation Notice,* 73 FR at 50304. We did not receive comments concerning the scope of the AD and CVD investigations of KASR from the PRC.

Scope of the Investigation

The scope of this investigation consists of shelving and racks for refrigerators, freezers, combined refrigerator-freezers, other refrigerating or freezing equipment, cooking stoves, ranges, and ovens (''certain kitchen appliance shelving and racks'' or ''the subject merchandise''). Certain kitchen appliance shelving and racks are defined as shelving, baskets, racks (with or without extension slides, which are carbon or stainless steel hardware devices that are connected to shelving, baskets, or racks to enable sliding), side racks (which are welded wire support structures for oven racks that attach to the interior walls of an oven cavity that does not include support ribs as a design feature), and subframes (which are welded wire support structures that interface with formed support ribs inside an oven cavity to support oven rack assemblies utilizing extension slides) with the following dimensions:

—Shelving and racks with dimensions ranging from 3 inches by 5 inches by 0.10 inch to 28 inches by 34 inches by 6 inches; or

—Baskets with dimensions ranging from 2 inches by 4 inches by 3 inches to 28 inches by 34 inches by 16 inches; or

—Side racks from 6 inches by 8 inches by 0.1 inch to 16 inches by 30 inches by 4 inches; or

—Subframes from 6 inches by 10 inches by 0.1 inch to 28 inches by 34 inches by 6 inches.

The subject merchandise is comprised of carbon or stainless steel wire ranging in thickness from 0.050 inch to 0.500 inch and may include sheet metal of either carbon or stainless steel ranging in thickness from 0.020 inch to 0.2 inch. The subject merchandise may be coated or uncoated and may be formed and/or welded. Excluded from the scope of this investigation is shelving in which the support surface is glass.

The merchandise subject to this investigation is currently classifiable in the Harmonized Tariff Schedule of the United States (''HTSUS'') statistical reporting numbers 8418.99.80.50, 7321.90.50.00, 7321.90.60.90 and 8516.90.80.00. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Period of Investigation

The period for which we are measuring subsidies, *i.e.*, the period of investigation (''POI''), is January 1, 2007, through December 31, 2007.

Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination

On August 26, 2008, and August 27, 2008, respectively, the Department initiated the CVD and AD investigations of certain kitchen appliance shelving and racks from the PRC. *See Initiation Notice* and *Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Initiation of Antidumping Duty Investigation,* 73 FR 50596 (August 27, 2008). The CVD investigation and the AD investigation have the same scope with regard to the merchandise covered.

As noted above, on December 19, 2008, the petitioners submitted a letter requesting alignment of the final CVD determination with the final determination in the companion AD investigation of certain kitchen appliance shelving and racks from the PRC. Therefore, in accordance with section 705(a)(1) of the Act and 19 CFR 351.210(b)(4), we are aligning these final determinations such that the final CVD determination will be issued on the same date as the final AD determination, which is currently scheduled to be issued no later than May 12, 2009, unless postponed.

Application of the Countervailing Duty Law to Imports From the PRC

On October 25, 2007, the Department published *Coated Free Sheet Paper From the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 72 FR 60645 (October 25, 2007) *(''CFS from the PRC''),* and the accompanying Issues and Decision Memorandum (''CFS Decision Memorandum''). *In CFS from the PRC,* the Department found that

> given the substantial differences between the Soviet-style economies and China's economy in recent years, the Department's previous decision not to apply the CVD law to these Soviet-style economies does not act as a bar to proceeding with a CVD investigation involving products from China.

See CFS Decision Memorandum, at Comment 6. The Department has affirmed its decision to apply the CVD law to the PRC in subsequent final determinations. *See, e.g., Circular Welded Carbon Quality Steel Pipe From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances,* 73 FR 31966 (June 5, 2008) *(''CWP from the PRC''),* and accompanying Issues and Decision Memorandum (''CWP Decision Memorandum''), at Comment 1.

Additionally, for the reasons stated in the CWP Decision Memorandum, we are using the date of December 11, 2001, the date on which the PRC became a member of the World Trade Organization, as the date from which the Department will identify and measure subsidies in the PRC. *See* CWP Decision Memorandum, at Comment 2.

Use of Facts Otherwise Available and Adverse Inferences

Sections 776(a)(1) and (2) of the Act provide that the Department shall apply ''facts otherwise available'' if, *inter alia,* necessary information is not on the record or an interested party or any other person: (A) Withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information.

Non-Cooperative Companies

In the instant investigation, the following five companies provided no response to the Department's ''quantity and value'' questionnaire issued during the respondent selection process: Changzhou Yixiong Metal Products Co., Ltd.; Foshan Winleader Metal Products Co., Ltd.; Kingsun Enterprises Group Co, Ltd.; Zhongshan Iwatani Co., Ltd.; and Yuyao Hanjun Metal Work Co./Yuyao Hanjun Metal Products Co., Ltd. (collectively, ''non-cooperative Q&V companies''). We attempted to solicit quantity and value information from these companies, and confirmed delivery of our questionnaires through Federal Express. In our attempt, we warned that ''{f}ailure to respond to this questionnaire may result in the Department determining that your company has decided not to participate in this proceeding and that your company has not cooperated to the best of its ability. As a consequence, the Department would consider applying facts available with an adverse inference in accordance with section 776(b) of the Tariff Act of 1930.'' *See* Letters to Changzhou Yixiong Metal Products Co., Ltd., *et al.*, from Susan H. Kuhbach, Director, AD/CVD Operations, Office 1, ''Quantity and Value Questionnaire for the Countervailing Duty Investigation of Certain Kitchen Appliance Shelving and Racks From the People's Republic of China'' (August 21, 2008). *See* Respondent Selection Memorandum for the details of our attempts to solicit information from the 12 producers and exporters identified in the petition.

The five non-cooperative Q&V companies withheld requested information and significantly impeded this proceeding. Specifically, by not responding to requests for information concerning the quantity and value of their sales, they impeded the Department's ability to select the most appropriate respondents in this investigation. Thus, in reaching our preliminary determination, pursuant to sections 776(a)(2)(A) and (C) of the Act, we have based the CVD rate for the non-cooperative Q&V companies on facts otherwise available.

We further determine that an adverse inference is warranted, pursuant to section 776(b) of the Act. By failing to submit responses to the Department's quantity and value questionnaires, these companies did not cooperate to the best of their ability in this investigation. Accordingly, we find that an adverse inference is warranted to ensure that the non-cooperating Q&V companies will not obtain a more favorable result than had they fully complied with our request for information.

Asber

As noted above, Asber was selected as a mandatory respondent. Asber, however, did not provide the requested information that is necessary to

determine a CVD rate for this preliminary determination and significantly impeded this proceeding. Specifically, Asber did not respond to the Department's October 7, 2008 CVD questionnaire. On October 23, 2008, counsel for Asber notified the Department that Asber would not participate in the investigation. Thus, in reaching our preliminary determination, pursuant to section 776(a)(2)(A) and (C) of the Act, we have based the CVD rate for Asber on facts otherwise available.

For the preliminary determination, we determine that an adverse inference is warranted, pursuant to section 776(b) of the Act. By failing to submit a response to the Department's initial questionnaire, Asber did not cooperate to the best of its ability in this investigation. Accordingly, we find that an adverse inference is warranted to ensure that Asber will not obtain a more favorable result than had it fully complied with our request for information.

In deciding which facts to use as adverse facts available (''AFA''), section 776(b) of the Act and 19 CFR 351.308(c)(1) authorize the Department to rely on information derived from: (1) The petition; (2) a final determination in the investigation; (3) any previous review or determination; or (4) any other information placed on the record. The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the rate is sufficiently adverse ''as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.'' *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan,* 63 FR 8909, 8932 (February 23, 1998). The Department's practice also ensures ''that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See* Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, Vol. I, at 870 (1994), reprinted at 1994 U.S.C.C.A.N. 4040, 4199.

It is the Department's practice to select, as AFA, the highest calculated rate in any segment of the proceeding. *See, e.g., Laminated Woven Sacks From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances,* 73 FR 35639 (June 24, 2008) (LWS from the PRC), and the accompanying Issues and Decision Memorandum (LWS Decision Memorandum) at ''Selection of the Adverse Facts Available.'' In previous CVD investigations into products from the PRC, we have adapted this practice to use the highest rate calculated for the same or similar programs in other PRC CVD investigations. *Id.* For the preliminary determination, consistent with the Department's recent practice, we are computing a total AFA rate for the non-cooperating companies, including Asber, generally using program-specific rates determined for the cooperating respondent or past cases. Specifically, for programs other than those involving income tax exemptions and reductions, we will apply the highest calculated rate for the identical program in this investigation if a responding company used the identical program. If there is no identical program match within the investigation, we will use the highest non-*de minimis* rate calculated for the same or similar program in another PRC CVD investigation. Absent an above-*de minimis* subsidy rate calculated for the same or similar program, we will apply the highest calculated subsidy rate for any program otherwise listed that could conceivably be used by the non-cooperating companies. *See, e.g., Lightweight Thermal Paper From the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 73 FR 57323 (Oct. 2, 2008), *(''LWTP from the PRC''),* and the accompanying Issues and Decision Memorandum (''LWTP Decision Memorandum'') at ''Selection of the Adverse Facts Available Rate.''

Further, where the GOC can demonstrate through complete, verifiable, positive evidence that non-cooperative companies (including all their facilities and cross-owned affiliates) are not located in particular provinces whose subsidies are being investigated, the Department does not intend to include those provincial programs in determining the countervailable subsidy rate for the non-cooperative companies, including Asber. *See Certain Tow-Behind Lawn Groomers and Certain Parts Thereof From the People's Republic of China: Initiation of Countervailing Duty Investigation*, 73 FR 42324 (July 21, 2008) (''*Lawn Groomers from the PRC*''), and the accompanying Initiation Checklist. In this investigation, the GOC has not provided any such information. Therefore, the Department makes the adverse inference that the non-cooperative Q&V companies had facilities and/or cross-owned affiliates that received subsidies under all of the sub-national programs alleged prior to the selection of mandatory respondents. With respect to the provincial or local programs alleged after respondent selection, we only assigned adverse rates to those mandatory respondents that petitioners alleged were located in the respective province or locality. *See* LWTP Decision Memorandum at pages 2–3. Consequently, in this case, we will include the following seven new subsidy programs in the calculation of Asber's rate: ''Preferential Land-Use Charges for Newly-Established, Industrial Projects in Zhongshan's Industrial Zones,'' ''Reduction of Land Price at the Township Level for Newly-Established, Industrial Projects in Zhongshan's Industrial Zones,'' ''Reduction in Urban Infrastructure Fee for Industrial Enterprises in Industrial Zones,'' ''Income Tax Rebate for 'Superior Industrial Enterprises' in Zhongshan,'' ''Accelerated Depreciation for New Technological Transformation Projects, 'Superior Industrial Enterprises' in Zhongshan,'' ''Exemption From the Tax on Investments in Fixed Assets for 'Superior Industrial Enterprises' in Zhongshan'' and ''Preferentially-Priced Electricity for 'Superior Industrial Enterprises.' ''

Foreign-Invested Enterprise (FIE) Income Tax Rate Reduction and Exemption Programs

For the four income tax rate reduction or exemption programs,[2] we have applied an adverse inference that the non-cooperative Q&V companies and Asber paid no income taxes during the POI. The standard income tax rate for corporations in the PRC is 30 percent, plus a 3 percent provincial income tax rate. Therefore, the highest possible benefit for all income tax reduction or exemption programs combined is 33 percent and we are applying a countervailing duty rate of 33 percent on an overall basis for these four income tax programs (*i.e.*, these four income tax programs combined to provide a countervailable benefit of 33 percent). This 33 percent AFA rate does not apply to tax credit or tax refund programs. *See, e.g.*, CWP Decision Memorandum, at 2; LWTP Decision Memorandum, at ''Selection of the Adverse Facts Available Rate.''

[2] ''Two Free, Three Half'' Program; Income Tax Reductions for FIEs based on Geographic Location; Income Tax Reduction for Export-Oriented FIEs; and Local Income Tax Exemption or Reduction Program for ''Productive'' FIEs.

Income Tax Credits and Rebates and Accelerated Depreciation

The 33 percent AFA rate does not apply to the six income tax credit and rebate or accelerated depreciation programs because such programs may not affect the tax rate and, hence, the subsidy conferred, in the current year. Wire King did not use the ''Income Tax Credits for Purchases of Domestically Produced Equipment by FIEs,'' ''Income Tax Refund for Reinvestment of Profits in Export-oriented Enterprises,'' ''Preferential Tax Subsidies for Research and Development at FIEs,'' ''Income Tax Credits for Purchases of Domestically Produced Equipment by Domestically Owned Companies,'' ''Income Tax Rebate for 'Superior Industrial Enterprises' in Zhongshan,'' [3] or ''Accelerated Depreciation for New Technological Transformation Projects 'Superior Industrial Enterprises' in Zhongshan'' [4] programs, nor have we found greater than *de minimis* benefits for these direct tax programs in other countervailing duty proceedings. Therefore, we have preliminarily determined to use the highest non-*de minimis* rate for any indirect tax program from a China CVD investigation. The rate we selected is 1.51 percent, which was the rate calculated for respondent Gold East Paper (Jiangsu) Co., Ltd (GE) for the ''Value-added Tax and Tariff Exemptions on Imported Equipment,'' program. *See CFS From the PRC* and CFS Decision Memorandum, at pages 13–14.

Indirect Tax and VAT/Tariff Reductions and Exemptions

For ''Exemption from City Construction Tax and Education Tax for FIEs in Guangdong Province,'' the rate we selected was 0.03 percent, which is the rate preliminarily determined for respondent Wire King's rate in this investigation. For the remaining indirect tax and VAT/Tariff Reduction programs, which Wire King did not use, we are applying the 1.51 percent rate calculated from respondent GE's ''Value-added Tax and Tariff Exemptions on Imported Equipment'' program. *See CFS From the PRC*, 72 FR 60645, and CFS Decision Memorandum, at pages 13–14. These remaining indirect tax and VAT/Tariff Reduction programs are: ''Reduction in or Exemption from Fixed Assets Investment Orientation Regulatory Tax,'' ''Exemption from Real Estate Tax and Dyke Maintaining Fee for FIEs in Guangdong Province,'' ''Reduction in Urban Infrastructure Fee for Industrial Enterprises in Industrial Zones,'' [5] ''Exemption from the Tax on Investments in Fixed Assets for 'Superior Industrial Enterprises' in Zhongshan,'' [6] ''Import Tariff and VAT Exemptions for FIEs and Certain Domestic Enterprises Using Imported Equipment in Encouraged Industries,'' ''VAT Rebates for FIEs Purchasing Domestically-Produced Equipment,'' ''Import Tariff Exemption for the ''Encouragement of Investment by Taiwanese Compatriots,'' ''Import Tariff Refunds and Exemptions for FIEs in Guangdong,'' and ''Import Tariff and VAT Refunds and Exemptions for FIEs in Zhejiang.''

Loans

For the ''Preferential Loans and Interest Rate Subsidies in Guangdong Province'' loan program, we have preliminarily determined to apply the highest non-*de minimis* subsidy rate for any loan program in a prior China CVD investigation. The rate was 7.99 percent for the ''Government Policy Lending Program,'' from *Lightweight Thermal Paper From the People's Republic of China: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order*, 73 FR 70958 (November 24, 2008) (''*Amended LWTP from the PRC*'').

Grants

For grant programs, Wire King did not use ''Funds for 'Outward Expansion' of Industries in Guangdong Province,'' ''Direct Grants—Guangdong,'' and ''Grants to Promote Exports from Zhejiang Province'' programs. The Department has not calculated any above *de minimis* rates for any of these programs in prior investigations, and, moreover, all previously calculated rates for grant programs from prior China CVD investigations have been *de minimis*. Therefore, for each of these programs, we have determined to use the highest calculated subsidy rate for any program otherwise listed, which could have been used by the non-cooperative Q&V companies or Asber. This rate was 13.36 percent for the ''Government Provision of Land for Less Than Adequate Remuneration,'' program from *LWS From the PRC. See* LWS Decision Memorandum, at 14–18.

Provision of Goods and Services at Less Than Adequate Remuneration (LTAR) Programs

Finally, for the ''Provision of Wire Rod for Less than Adequate Remuneration by the GOC,'' we are using the rate calculated for respondent Wire King. For ''Land-Related Subsidies to Companies Located in Specific Regions of Guangdong,'' ''Preferential Land-Use Charges for Newly-Established, Industrial Projects in Zhongshan's Industrial Zones,'' [7] ''Reduction of Land Price at the Township Level for Newly-Established Industrial Projects in Zhongshan's Industrial Zones,'' [8] and ''Land-Related Subsidies to Companies Located in Specific Regions of Zhejiang,'' programs, we have used the highest calculated rate for a land LTAR program from a previous China CVD investigation. This rate was 13.36 percent for the ''Government Provision of Land for Less Than Adequate Remuneration,'' program from *LWS From the PRC. Id.* For the ''Provision of Nickel for Less than Adequate Remuneration by the GOC,'' ''Government Provision of Electricity at Less than Adequate Remuneration to Companies Located in Development Zones in Guangdong Province,'' and ''Preferentially-Priced Electricity for 'Superior Industrial Enterprises,' '' [9] we have preliminarily determined to use the highest non-*de minimis* rate calculated for a provision of goods or services at LTAR program from which the non-cooperative respondents and Asber could have benefitted. This rate was 13.36 percent for the ''Government Provision of Land for Less Than Adequate Remuneration,'' program from *LWS From the PRC. Id.*

For further explanation of the derivation of the AFA rates, *see* Memorandum to the File, ''Adverse Facts Available Rate'' (December 22, 2008) (''AFA Calc Memo'').

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is ''information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject

[3] As noted above, this program is only included in Asber's AFA rate.

[4] As noted above, this program is only included in Asber's AFA rate.

[5] As noted above, this program is only included in Asber's AFA rate.

[6] As noted above, this program is only included in Asber's AFA rate.

[7] As noted above, this program is only included in Asber's AFA rate.

[8] As noted above, this program is only included in Asber's AFA rate.

[9] As noted above, this program is only included in Asber's AFA rate.

merchandise, or any previous review under section 751 concerning the subject merchandise.'' *See e.g.*, SAA, at 870, 1994 U.S.C.C.A.N. at 4199. The Department considers information to be corroborated if it has probative value. *See id.* To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used. The SAA emphasizes, however, that the Department need not prove that the selected facts available are the best alternative information. *See* SAA, at 869, 1994 U.S.C.C.A.N. at 4199.

With regard to the reliability aspect of corroboration, we note that these rates were calculated in recent prior final CVD determinations. Further, the calculated rates were based upon verified information about the same or similar programs. Moreover, no information has been presented that calls into question the reliability of these calculated rates that we are applying as AFA. Finally, unlike other types of information, such as publicly available data on the national inflation rate of a given country or national average interest rates, there typically are no independent sources for data on company-specific benefits resulting from countervailable subsidy programs.

With respect to the relevance aspect of corroborating the rates selected, the Department will consider information reasonably at its disposal in considering the relevance of information used to calculate a countervailable subsidy benefit. Where circumstances indicate that the information is not appropriate as AFA, the Department will not use it. *See Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review*, 61 FR 6812 (February 22, 1996).

In the absence of record evidence concerning these programs due to non-cooperative Q&V companies and Asber's decision not to participate in the investigation, the Department has reviewed the information concerning PRC subsidy programs in this and other cases. For those programs for which the Department has found a program-type match, we find that, because these are the same or similar programs, they are relevant to the programs of this case. For the programs for which there is no program-type match, the Department has selected the highest calculated subsidy rate for any PRC program from which the non-cooperative Q&V companies and Asber could receive a benefit to use as AFA. The relevance of these rates is that it is an actual calculated CVD rate for a PRC program from which the non-cooperative Q&V companies and Asber could actually receive a benefit. Further, these rates were calculated for periods close to, and overlapping with, the POI in the instant case. Moreover, these companies' failure to respond to requests for information has ''resulted in an egregious lack of evidence on the record to suggest an alternative rate.'' *Shanghai Taoen Int'l Trading Co.* v. *United States*, 360 F. supp. 2d 1339, 1348 (CIT 2005). Due to the lack of participation by the non-cooperative Q&V companies and Asber and the resulting lack of record information concerning these programs, the Department has corroborated the rates it selected to the extent practicable.

On this basis, we preliminarily determine that the AFA countervailable subsidy rate for Asber is 197.14 percent *ad valorem.* We preliminarily determine that the AFA countervailable subsidy rate for the non-cooperative Q&V companies is 162.87 percent *ad valorem. See* AFA Calc Memo.

Application of ''All Others'' Rate to Companies Not Selected as Mandatory Respondents

In addition to Wire King and Asber, the Department received responses to its quantity and value questionnaire from the following five companies: Hangzhou Dunli Import & Export Co., Jiangsu Weixi Group Co., Leader Metal Industry Co. Ltd., Meizhigao Co.,[10] and New King Shan, Zhuhai. See *Respondent Selection Memorandum.* While these five companies were not chosen as mandatory respondents, because they cooperated fully with the Department's request for quantity and value information regarding their sales, we are applying the all others rate to them.

Subsidies Valuation Information

Allocation Period

The average useful life (''AUL'') period in this proceeding, as described in 19 CFR 351.524(d)(2), is 12 years according to the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System. *See* U.S. Internal Revenue Service Publication 946 (2007), *How to Depreciate Property*, at Table B–2: Table of Class Lives and Recovery Periods. No party in this proceeding has disputed this allocation period.

Attribution of Subsidies

The Department's regulations at 19 CFR 351.525(b)(6)(i) state that the Department will normally attribute a subsidy to the products produced by the corporation that received the subsidy. However, 19 CFR 351.525(b)(6)(ii)–(v) direct that the Department will attribute subsidies received by certain other companies to the combined sales of those companies if (1) Cross-ownership exists between the companies, and (2) the cross-owned companies produce the subject merchandise, are a holding or parent company of the subject company, produce an input that is primarily dedicated to the production of the downstream product, or transfer a subsidy to a cross-owned company. The Court of International Trade (''CIT'') has upheld the Department's authority to attribute subsidies based on whether a company could use or direct the subsidy benefits of another company in essentially the same way it could use its own subsidy benefits. *See Fabrique de Fer de Charleroi* v. *United States*, 166 F. Supp. 2d 593, 604 (CIT 2001).

According to 19 CFR 351.525(b)(6)(vi), cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. This regulation states that this standard will normally be met where there is a majority voting interest between two corporations or through common ownership of two (or more) corporations.

Wire King responded on behalf of itself, a Hong Kong-owned foreign invested enterprise. Wire King identified several affiliated companies and claims that these affiliates do not produce the subject merchandise and do not provide inputs to Wire King. We intend to seek further information from Wire King regarding certain affiliates that may provide an input to Wire King or otherwise fall within the situations described in 19 CFR 351.525(b)(6)(iii)–(v). For purposes of the Preliminary Determination, we are limiting our analysis to Wire King.

Analysis of Programs

Based upon our analysis of the petition and the responses to our questionnaires, we determine the following:

I. Programs Preliminarily Determined To Be Countervailable

A. Income Tax Reduction for Foreign Invested Enterprises (''FIEs'') Based on Geographic Location

To promote economic development and attract foreign investment, ''productive'' FIEs located in coastal economic zones, special economic

[10] Meizhigao Co. reported that it did not have shipments of the subject merchandise to the United States during the POI, except for one sample sale.

zones or economic and technical development zones in the PRC receive preferential tax rates of 15 percent or 24 percent, depending on the zone, under Article 7 of the *Foreign Investment Enterprise Tax Law (''FIE Tax Law'')*. *See* GQR, at Exhibit 4. This program was created June 15, 1988, pursuant to the *Provisional Rules on Exemption and Reduction of Corporate Income Tax and Business Tax of FIEs in Coastal Economic Development Zone* issued by the Ministry of Finance. *See* GQR, at Exhibit 11. The March 18, 1988, *Circular of State Council on Enlargement of Economic Areas* enlarged the scope of the coastal economic areas and the July 1, 1991, *FIE Tax Law* continued this policy. *See* GQR, at Exhibit 4.

The Department has previously found this program to be countervailable. *See CFS from the PRC, LWTP from the PRC*, and *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 73 FR 40480 (July 15, 2008) (''*Tires from the PRC*'') and accompanying Issues and Decision Memorandum (''Tires Decision Memorandum'').

Wire King is located in a coastal economic development zone and was subject to the reduced income tax rate of 24 percent for the tax returned filed during the POI.

We preliminarily determine that the reduced income tax rate paid by productive FIEs under this program confers a countervailable subsidy. The reduced rate is a financial contribution in the form of revenue forgone by the GOC and it provides a benefit to the recipient in the amount of the tax savings. *See* section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). We further determine preliminarily that the reduction afforded by this program is limited to enterprises located in designated geographic regions and, hence, is specific under section 771(5A)(D)(iv) of the Act.

To calculate the benefit, we treated Wire King's income tax savings as a recurring benefit, consistent with 19 CFR 351.524(c)(1), and divided the company's tax savings received during the POI by the company's total sales during that period. To compute the amount of the tax savings, we compared the income tax rate Wire King would have paid in the absence of the program (30 percent) with the rate it paid (24 percent).

On this basis, we preliminarily determine that Wire King received a countervailable subsidy of 0.30 percent *ad valorem* under this program.

B. Income Tax Reduction for Export-Oriented FIEs

Article 75(7) of the *Detailed Rules for Implementation of the Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises* and the *FIE Tax Law* authorize export-oriented FIEs to reduce their income tax to half the national income tax rate. *See* GQR, at 6. Export-oriented FIEs are defined as FIEs with export product sales that exceed 70 percent of their total sales value.

Wire King qualified for this benefit and paid a reduced income tax rate of 12 percent for the tax return filed during the POI. *See* WKQR, at 10.

We preliminarily determine that the reduction in the income tax paid by export-oriented FIEs under this program confers a countervailable subsidy. The exemption/reduction is a financial contribution in the form of revenue forgone by the government and it provides a benefit to the recipient in the amount of the tax savings. *See* section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). We also preliminarily determine that the exemption/reduction afforded by this program is contingent as a matter of law on export performance, and, hence, is specific under section 771(5A)(B) of the Act.

To calculate the benefit, we treated Wire King's income tax savings as a recurring benefit, consistent with 19 CFR 351.524(c)(1), and divided the company's tax savings received during the POI by the export sales of Wire King during that period. To compute the amount of the tax savings, we compared the rate Wire King would have paid in the absence of the program (24 percent) with the rate the company paid (12 percent). On this basis, we preliminarily determine the countervailable subsidy attributable to Wire King to be 0.94 percent *ad valorem* under this program.

C. Local Income Tax Exemption or Reduction for ''Productive'' FIEs

Under Article 9 of the *FIE Tax Law,* the provincial governments have the authority to grant an exemption or reduction in local income taxes to FIEs. *See* GQR, at 36. The GOC states that, according to the ''Equity Joint Venture Tax Law,'' the local income tax rate is set at ten percent of the enterprise income tax rate, which was 30 percent during the POI. According to the GOC, the Guangdong People's Government published its own *Rules on Exemption and Reduction of Local Income Tax for Foreign Invested Enterprises. Id.* Under Article 5 of these rules, productive and/or export-oriented FIEs that were eligible to pay income tax at half the normal rate shall also be exempted from the local income tax during the same period.

Wire King reported being exempted from local income tax on the tax return filed during the POI. *See* WKQR, at 15.

We preliminarily determine that the exemption or reduction in the local income tax paid by FIEs under this program confers a countervailable subsidy. The exemption is a financial contribution in the form of revenue forgone by the government and it provides a benefit to the recipient in the amount of the tax savings. *See* section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). We also preliminarily determine that the exemption afforded by this program is contingent as a matter of law on export performance, and, hence, is specific under section 771(5A)(B) of the Act.

To calculate the benefit, we treated Wire King's income tax savings as a recurring benefit, consistent with 19 CFR 351.524(c)(1), and divided the company's tax savings received during the POI by the export sales of Wire King during that period. To compute the amount of the tax savings, we compared the rate Wire King would have paid in the absence of the program (3 percent) with the rate the company paid (zero). On this basis, we preliminarily determine the countervailable subsidy attributable to Wire King to be 0.23 percent *ad valorem* under this program.

D. Exemption From City Construction Tax and Education Tax for FIEs in Guangdong Province

Pursuant to the *Circular on Temporarily Not Collecting City Maintenance and Construction Tax and Education Fee Surcharge for FIEs and Foreign Enterprises* (GUOSHUIFA {1994} No. 38), the local tax authorities exempt all FIEs and foreign enterprises from the city maintenance and construction tax and education fee surcharge. *See* GQR, at Exhibit 23. The city maintenance and construction tax is normally seven percent of a company's VAT payable, while the education fee surcharge is normally three percent of a company's VAT payable. *See* GQR, at Exhibits 21 and 22; *see also,* G1SR, at 8–9.

Wire King reported that it was exempted from the city construction tax and educational surcharges during the POI. *See* WKQR, at 16.

We preliminarily determine that the exemptions from the city construction tax and education surcharge under this program confer a countervailable subsidy. The exemptions are financial

contributions in the form of revenue forgone by the government and provide a benefit to the recipient in the amount of the savings. *See* section 771(5)(D)(ii) of the Act and 19 CFR 351.509(a)(1). We also preliminarily determine that the exemptions afforded by this program are limited as a matter of law to certain enterprises, FIEs, and, hence, specific under section 771(5A)(D)(i) of the Act.

To calculate the benefit, we treated Wire King's tax savings and exemptions as a recurring benefit, consistent with 19 CFR 351.524(c)(1), and divided the company's savings received during the POI by the total sales of Wire King during that period. To compute the amount of the city construction tax savings, we compared the rate Wire King would have paid in the absence of the program (seven percent of its VAT payable during the POI) with the rate the company paid (zero). *See* WKQR, at 16. To compute the amount of the savings from the educational surcharge exemption, we compared the rate Wire King would have paid in the absence of the program (three percent of VAT payable during the POI) with the rate the company paid (zero). *Id.* On this basis, we preliminarily determine the countervailable subsidy attributable to Wire King to be 0.03 percent *ad valorem* under this program.

E. Provision of Wire Rod for Less Than Adequate Remuneration

The Department is investigating whether GOC authorities provided wire rod to producers of KASR for LTAR. In its original questionnaire response, Wire King stated that it obtained its wire rod primarily from trading companies and it provided the names of the trading companies and the amounts purchased from each of them (by month) during the POI. Wire King also stated that it was working with its trading companies to obtain the names of the companies that produced the wire rod. Wire King provided those names in Exhibit 1 of the WK2SR.

In our original and supplemental questionnaires, we asked Wire King to provide the names of its wire rod producers to the GOC so that the government could respond to our questions about the ownership of these companies. Because the company names were not provided by Wire King until shortly before this preliminary determination, the GOC has not had sufficient time to provide the requested ownership information. Consequently, for purposes of this preliminary determination we have relied on facts available regarding ownership of these wire rod producers. *See* ''Business Proprietary Information Memorandum for the Preliminary Results,'' December 22, 2008 (''*BPI Memo*''). We will seek the necessary ownership information from the GOC for our final determination.

In *CWP From the PRC,* the Department determined that when a respondent purchases an input from a trading company, a subsidy is conferred if the producer of the input is an ''authority'' within the meaning of section 771(5)(B) and the price paid by the respondent for the input is less than adequate remuneration. (CWP Decision Memorandum at p.10). Moreover, in *Tires from the PRC,* the Department determined that majority government ownership of a producer is sufficient to qualify it as an ''authority.'' (Tires Decision Memorandum at p. 10). Based on the record in the instant investigation, we preliminarily determine that certain wire rod producers that supply Wire King are majority-government owned and, hence, authorities. Thus, Wire King received a subsidy to the extent that the price it paid for wire rod produced by these suppliers was less than adequate remuneration.

The Department's regulations at 19 CFR 351.511(a)(2) set forth the basis for identifying appropriate market-determined benchmarks for measuring the adequacy of remuneration for government-provided goods or services. These potential benchmarks are listed in hierarchical order by preference: (1) Market prices from actual transactions within the country under investigation (*e.g.*, actual sales, actual imports or competitively run government auctions) (tier one); (2) world market prices that would be available to purchasers in the country under investigation (tier two); or (3) an assessment of whether the government price is consistent with market principles (tier three). As we explained in *Canadian Lumber,* the preferred benchmark in the hierarchy is an observed market price from actual transactions within the country under investigation because such prices generally would be expected to reflect most closely the prevailing market conditions of the purchaser under investigation. (*See Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada,* 67 FR 15545 (April 2, 2002) (''*Canadian Lumber*'') and accompanying Issues and Decision Memorandum at page 36.)

Beginning with tier one, we must determine whether the prices from actual sales transactions involving Chinese buyers and sellers are significantly distorted. As explained in the CVD Preamble: ''Where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to the next alternative {tier two} in the hierarchy.'' *See Countervailing Duties; Final Rule,* 63 FR 65348, 65377 (November 25, 1998) (CVD Preamble). The CVD Preamble further recognizes that distortion can occur when the government provider constitutes a majority, or in certain circumstances, a substantial portion of the market.

The GOC has reported that state-owned enterprises (''SOEs'') accounted for approximately 45.67 percent of the wire rod production in the PRC during the POI. While this is not a majority of the production, the SOEs' market share is substantial and there are other examples of government involvement in the market. Specifically, a 10 percent export tariff on wire rod was put in place during the POI and export licensing was instituted. Moreover, in reporting the share of PRC wire rod production accounted for by SOEs, the GOC defined SOEs as firms having 50 percent or more government ownership. It is entirely possible, based on a fuller analysis, that the Department would find that additional wire rod producers are ''authorities'' and, hence, that the GOC accounts for more than 45.67 percent of production, *i.e.*, the reported level may be a conservative measure.

The GOC also placed on the record aggregate import price data for wire rod from various countries. Information from the GOC indicates that imports of wire rod accounted for 1.53 percent of the volume of wire rod available in the Chinese market during the POI. Because the share of imports of wire rod into the PRC is small relative to Chinese domestic production of wire rod, we are not using the aggregate import price data in our benchmark calculations. This is consistent with the Department's approach in *Light-Walled Rectangular Pipe and Tube From the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 73 FR 35632 (June 24, 2008) (''*LWRP From the PRC*'') and the accompanying issues and decision memorandum (''LWRP Decision Memorandum'') at Comment 7.

Consequently, we preliminarily determine that there are no tier one benchmark prices and have turned to tier two, *i.e.*, world market prices in the PRC. Petitioners have put on the record data from the *Steel Business Briefing* (''SBB'') which includes monthly prices for mesh wire rod in North America and Europe. See Exhibit 82 of petitioners' July 31, 2008, petition. Wire King

submitted monthly prices for mesh wire rod in Asia from two sources: SBB and MEPS International Ltd. (''MEPS''). In analyzing this data, the Department found world market prices from MEPS, which we have placed on the record. *See* Memorandum to the File, ''Information Re: World Market Prices on Record,'' (December 22, 2008).

We preliminarily determine that data from both SBB and MEPS should be used to derive a world market price for wire rod that would be available to purchasers of wire rod in the PRC. We note that the Department has relied on pricing data from industry publications such as SBB and MEPs in recent CVD proceedings involving the PRC. *See* CWP Decision Memorandum at p. 11 and LWRP Decision Memorandum at p. 9. Also, 19 CFR 351.511(a)(2)(ii), states that where there is more than one commercially available world market price, the Department will average the prices to the extent practicable. Therefore, we first derived a world market SBB price by averaging the monthly prices for the North America, Europe and Asia from SSB and then averaged that result with the MEPS world market price.

The prices for wire rod in SBB and MEPS are expressed in U.S. dollars (''USD'') per short ton (''ST''). Therefore, to determine what price would constitute adequate remuneration, we first converted the benchmark prices from U.S. dollars to renminbi (''RMB'') using USD to RMB exchange rates, as reported by the Federal Reserve Statistical Release.

Under 19 CFR 351.511(a)(2)(iv), when measuring the adequacy of remuneration under tier one or tier two, the Department will adjust the benchmark price to reflect the price that a firm actually paid or would pay if it imported the product, including delivery charges and import duties. Regarding delivery charges, we have included the freight costs that would be incurred in shipping wire rod from North America, Europe and Asia. We have also added import duties, as reported by the GOC, and the VAT applicable to imports of wire rod into the PRC.

Comparing the benchmark unit prices to the unit prices paid by the respondent for wire rod, we preliminarily determine that wire rod was provided for less than adequate remuneration and that a benefit exists in the amount of the difference between the benchmark and what the respondent paid. *See* 19 CFR 351.511(a).

Finally, with respect to specificity, the GOC has provided information on end uses for wire rod. *See* GQR at Exhibit 17. The GOC stated that the end uses would relate to the type of industry involved as a direct purchaser of the input. *See* GQR at Exhibit 33.

While numerous companies may comprise the listed industries, section 771(5A)(D)(iii)(I) clearly directs the Department to conduct its analysis on an industry or enterprise basis. Based on our review of the data and consistent with our past practice, we preliminarily determine that the industries named by the GOC are limited in number and, hence, the subsidy is specific. See section 771(5A)(D)(iii)(I). *See* also LWRP Decision Memorandum at Comment 7.

Therefore, we preliminarily determine that a countervailable subsidy was conferred on Wire King through the GOC's provision of wire rod for less than adequate remuneration. To calculate the subsidy, we took the difference between the delivered world market price and what Wire King paid for wire rod produced by majority government owned producers during the POI. We divided this by Wire King's total sales during the POI. On this basis, we preliminarily calculated a net countervailable subsidy rate of 11.72 percent *ad valorem* for Wire King.

II. Programs Determined To Be Terminated

A. Exemption From Project Consulting Fee for Export-oriented Industries

The Department has determined that this program was terminated in 1998, with no residual benefits. *See CFS From the PRC* and accompanying Issues and Decision Memorandum at ''Programs Determined to be Terminated.''

III. Programs Preliminarily Determined Not To Exist

A. Income Tax Exemption for Investment in Domestic ''Technological Renovation''

In its November 20, 2008 questionnaire response, the GOC reported that the Income Tax Exemption for Investment in Domestic ''Technological Renovation'' program does not exist. The GOC explained that the description corresponds to the investigated program ''Income Tax Credits for Domestically-Owned Companies Purchasing Domestically Produced Equipment,'' which is listed in section III below. *See* GQR, at 22. Therefore, we have not included this program for purposes of this Preliminary Determination.

IV. Programs Preliminarily Determined To Be Not Used by Wire King or To Not Provide Benefits During the POI

A. Exemption From Land Development Fees for Enterprises Located in Industrial Cluster Zones

Under the *Circular on Printing and Distributing the Implementation Rules for the Construction of Intensive Industrial Zones* (SHUNFUBANFA{2002}No.33), the People's Government of Shunde exempted from the land development fees land users located in intensive industrial zones. *See* GOC NSAQR, at 2. The purpose of this program was to promote the construction of intensive industrial zones in Shunde.

Wire King and the GOC reported that although Wire King is not located in an intensive industrial zone, the Government of Shunde agreed to extend the preferential treatment to land obtained by Wire King in 2003. *See* WK NSAQR, at 2; *see also,* GOC NSAQR, at 2. Wire King reported that this exemption occurred only when the land was obtained and, thus, it was a one-time exemption. *See* WK NSAQR, at 2.

For this one-time exemption from land development fees, based on our calculations, the benefit would be expensed prior to the POI, *i.e.*, the grants were less than 0.5 percent of the relevant sales in the years in which the grants were approved. Therefore, any potential benefit received by Wire King would have been attributed to the year of receipt (*i.e.*, 2003). We note that to calculate the benefit under this program, we used Wire King's 2004 total sales figures, which are the best available facts on the record at this time. The Department will issue a supplemental questionnaire after the preliminary determination is issued in order to obtain Wire King's 2003 sales figures.

B. Reduction in Farmland Development Fees for Enterprises Located in Industrial Zones

According to the *Circular on Printing and Distributing the Implementation Rules for the Construction of Intensive Industrial Zones* (SHUNFUBANFA{2002}No.33), the People's Government of Shunde has the authority to reduce the farmland cultivation fees for the enterprises located in the intensive industrial zones within Shunde. *See* GOC NSAQR, at 10. The program was created to protect the farmland.

The GOC and Wire King reported that although Wire King is not located in an intensive industrial zone, the Government of Shunde agreed to grant Wire King a reduction of the farmland

cultivation fee in 2003 when Wire King purchased a parcel of land. *See* WK NSAQR, at 2; *see also,* GOC NSAQR, at 10. Wire King reported that this exemption occurred only when the land was obtained and, thus, it was a one-time reduction. *See* WK NSAQR, at 2.

For this one-time reduction of farmland development fees, based on our calculations, the benefit would be expensed prior to the POI, *i.e.*, the grants were less than 0.5 percent of the relevant sales in the years in which the grants were approved. We note that to calculate the benefit under this program, we used Wire King's 2004 total sales figures, which are the best available facts on the record at this time. The Department will issue a supplemental questionnaire after the preliminary determination is issued in order to obtain Wire King's 2003 sales figures.

Based upon responses by the GOC and Wire King, we preliminarily determine that Wire King did not apply for or receive benefits during the POI under the programs listed below. *See* GQR, G1SR, WKQR, WK1SR, WK2SR, WK NSAQR, and GOC NSAQR.

1. ''Two Free, Three Half'' program.
2. Income tax refund for reinvestment of profits in export-oriented enterprises.
3. Preferential tax subsidies for research and development by FIEs.
4. Income tax credits for purchases of domestically produced equipment by FIEs.
5. Income tax credits for purchases of domestically produced equipment by domestically owned companies.
6. Reduction in or exemption from the fixed assets investment orientation regulatory tax.
7. Value Added Tax (''VAT'') rebates for FIEs purchasing domestically-produced equipment.
8. Import tariff and VAT exemptions for FIEs and certain domestic enterprises using imported equipment in encouraged industries.
9. Import tariff exemptions for the ''encouragement of investment by Taiwan Compatriots.''
10. Exemption from real estate tax and dyke maintenance fee for FIEs in Guangdong Province.
11. Import tariff refunds and exemptions for FIEs in Guangdong Province.
12. Preferential loans and interest rate subsidies in Guangdong Province.
13. Direct grants in Guangdong Province.
14. Funds for ''outward expansion'' of industries in Guangdong Province.
15. Land-related subsidies to companies located in specific regions of Guangdong Province.
16. Government provision of electricity at less than adequate remuneration to companies located in development zones in Guangdong Province.
17. Import tariff and VAT refunds and exemptions for FIEs in Zhejiang.
18. Grants to promote exports from Zhejiang Province.
19. Land-related subsidies to companies located in specific regions of Zhejiang.
20. Provision of Nickel for Less than Adequate Remuneration by the GOC.
21. Government Provision of Water for Less than Adequate Remuneration to Companies Located in Development Zones in Guangdong Province.
22. Exemption from District and Township Level Highway Construction Fees for Enterprises Located in Industrial Cluster Zones.
23. Exemptions from or Reductions in Educational Supplementary Fees and Embankment Defense Fees for Enterprises Located in Industrial Cluster Zones.
24. Preferential Electricity Rates Charged to Enterprises Located in Industrial Cluster Zones.
25. Special Subsidy from the Technology Development Fund to Encourage Technology Innovation.
26. Special Subsidy from the Technology Development Fund to Encourage Technology Development.
27. Subsidies to Encourage Enterprises in Industrial Cluster Zones to Hire Post-Doctoral Workers.
28. Land Purchase Grant Subsidy to Enterprises Located in Industrial Cluster Zones and Encouraged Enterprises.
29. Discounted Electricity Rates for Foreign-Invested Enterprises.
30. Exemption from Accommodating Facilities Fees for High-Tech and Large-Scale Foreign-Invested Enterprises.
31. Income Tax Deduction for Technology Development Expenses of Foreign-Invested Enterprises.
32. Preferential Land-Use Charges for Newly-Established, Industrial Projects in Zhongshan's Industrial Zones.
33. Reduction of Land Price at the Township Level for Newly-Established, Industrial Projects in Zhongshan's Industrial Zones.
34. Reduction in Urban Infrastructure Fee for Industrial Enterprises in Industrial Zones.
35. Income Tax Rebate for ''Superior Industrial Enterprises'' in Zhongshan.
36. Accelerated Depreciation for New Technological Transformation Projects ''Superior Industrial Enterprises'' in Zhongshan.
37. Exemption from the Tax on Investments in Fixed Assets for ''Superior Industrial Enterprises'' in Zhongshan.
38. Preferentially-Priced Electricity for 'Superior Industrial Enterprises.'

V. Programs for Which More Information Is Required

A. Government Provision of Electricity for Less Than Adequate Remuneration

The petitioners made several allegations regarding governmental provision of electricity. In the petition, they alleged that companies located within development zones in Guangdong province received electricity for less than adequate remuneration. *See* July 31, 2008 *Antidumping and Countervailing Duty Petition,* which is on file in the Department's CRU. In their new subsidy allegations, petitioners contended that companies located within industrial cluster zones in Shunde District paid preferential rates and that FIEs in Shunde District received electricity discounts. *See October 3, 2008 New Subsidy Allegations,* which are on file in the Department's CRU.

The GOC and Wire King responded that the company does not receive any of the alleged benefits. Wire King is a ''large scale industrial user'' and pays the large scale industrial user rate in Foshan. *See* GQR, at 58. According to the GOC's response, there were 7892 large scale users in Foshan during the POI, and the only companies singled out to receive preferential rates were small- and medium-sized chemical fertilizer producers. *Id.* With respect to the alleged electricity subsidies for certain companies in Shunde, the GOC and Wire King responded that the company is not located in an industrial cluster zone and that discounts paid to FIEs were abolished in 2002. *See* GOC NSAQR, at 21; *see also,* WK NSAQR, at 4. Moreover, according to the GOC, the China Southern Power Grid, the government-owned distributor of electricity in this area, is not obliged to carry out local governments' instructions to provide preferential electricity rates and did not do so. *See* GOC NSAQR, at 21.

Therefore, we preliminarily determine that Wire King did not benefit from alleged electricity subsidies by virtue of its location in particular development zones or because it is an FIE.

However, as the Department stated in LWTP Decision Memorandum at page 24, ''in any future administrative review of this proceeding, as well as in other China CVD proceedings (where relevant and practicable), we intend to investigate and analyze further the electricity rate-setting authority in China and the considerations that go into setting those rates.'' In this investigation we asked for and received certain information from the GOC about electricity rates in the PRC. The GOC

reported that, prior to 2002, electricity prices in Guangdong were determined locally and that they varied across the different municipal regions because the development level of the supplying power plants varied across the municipal regions. *See* GQR, at 56–57. Since 2002, when the National Development and Reform Commission (NDRC) became involved in setting retail electricity prices in Guangdong, these retail price differences have been maintained or narrowed. *See* GQR, at 57. Additionally, the GOC stated that pursuant to the *Provisional Administrative Measures on Prices for Sales of Electricity* retail prices for electricity are composed of the cost of purchasing electricity, the price for transmitting electricity, transmission loss, and governmental surcharges. *Id.* The NDRC Circulars setting out price adjustments for all provinces generally reflect this price structure. *See* GQR, at Exhibits 38 to 44. In Guangdong Province, for example, the average retail price for electricity increased, as did the amounts paid to supplying power plants, the amount paid to cover the debt service for transmission and distribution projects, and various surcharges. *See id.* at Exhibit 44.

For the final determination, we intend to seek further information regarding the GOC's electricity rate-setting policy. Specifically, we will be sending a questionnaire asking the GOC to identify all agencies (local, provincial and national) that are involved in setting rates and the process for determining the increase in rates. We plan to issue a post-preliminary analysis so that parties will have an opportunity to comment on our findings prior to our final determination.

Verification

In accordance with section 782(i)(1) of the Act, we will verify the information submitted by the respondents prior to making our final determination.

Suspension of Liquidation

In accordance with section 703(d)(1)(A)(i) of the Act, we calculated an individual rate for each producer/exporter of the subject merchandise individually investigated. We preliminarily determine the total estimated net countervailable subsidy rates to be:

Exporter/Manufacturer	Net subsidy rate
Guangdong Wire King Co., Ltd. (formerly known as Foshan Shunde Wireking Housewares & Hardware)	13.22
Asber Enterprises Co., Ltd. (China)	197.14
Changzhou Yixiong Metal Products Co., Ltd	162.87
Foshan Winleader Metal Products Co., Ltd	162.87
Kingsun Enterprises Group Co, Ltd	162.87
Yuyao Hanjun Metal Work Co./ Yuyao Hanjun Metal Products Co., Ltd	162.87
Zhongshan Iwatani Co., Ltd	162.87
All-Others	13.22

In accordance with sections 703(d) and 705(c)(5)(A) of the Act, for companies not investigated, we determined an ''all others'' rate by weighting the individual company subsidy rate of each of the companies investigated by the company's exports of the subject merchandise to the United States. The ''all others'' rate does not include zero and *de minimis* rates or any rates based solely on the facts available. In this investigation, because we have only one rate that can be used to calculate the all-others rate, Wire King's rate, we have assigned that rate to all-others. In accordance with sections 703(d)(1)(B) and (2) of the Act, we are directing U.S. Customs and Border Protection (''CBP'') to suspend liquidation of all entries of KASR from the PRC that are entered, or withdrawn from warehouse, for consumption on or after the date of the publication of this notice in the **Federal Register**, and to require a cash deposit or bond for such entries of merchandise in the amounts indicated above.

ITC Notification

In accordance with section 703(f) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and non-proprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Assistant Secretary for Import Administration.

In accordance with section 705(b)(2) of the Act, if our final determination is affirmative, the ITC will make its final determination within 45 days after the Department makes its final determination.

Disclosure and Public Comment

In accordance with 19 CFR 351.224(b), we will disclose to the parties the calculations for this preliminary determination within five days of its announcement. Due to the anticipated timing of verification and issuance of verification reports, case briefs for this investigation must be submitted no later than one week after the issuance of the last verification report. *See* 19 CFR 351.309(c)(i) (for a further discussion of case briefs). Rebuttal briefs must be filed within five days after the deadline for submission of case briefs, pursuant to 19 CFR 351.309(d)(1). A list of authorities relied upon, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. *See* 19 CFR 351.309(c)(2) and (d)(2).

Section 774 of the Act provides that the Department will hold a public hearing to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs, provided that such a hearing is requested by an interested party. If a request for a hearing is made in this investigation, the hearing will be held two days after the deadline for submission of the rebuttal briefs, pursuant to 19 CFR 351.310(d), at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, 14th Street and Constitution Avenue, NW., Washington, DC 20230, within 30 days of the publication of this notice, pursuant to 19 CFR 351.310(c). Requests should contain: (1) The party's name, address, and telephone; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. *See id.*

This determination is published pursuant to sections 703(f) and 777(i) of the Act.

Dated: December 22, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–31175 Filed 1–6–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Notice of Vacancies on the U.S.-Iraq Business Dialogue

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: The U.S. Department of Commerce and the Iraqi Ministry of Trade established the U.S.-Iraq Business Dialogue (Business Dialogue or Dialogue) in July 2006. This notice announces four open membership opportunities for American representatives to join the U.S. section of the Dialogue.

DATES: Applications must be received no later than January 21, 2008; 5 p.m. EST.

ADDRESSES: Please send requests for consideration to Ms. Susan Hamrock Mann, Director, Iraq Investment and Reconstruction Task Force, U.S. Department of Commerce, either by fax on 202–482–0980 or by mail to U.S. Department of Commerce, 14th and Constitution Avenue, NW., Mail Stop 3868, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Mr. Kevin M. Reichelt, Office of the Middle East, U.S. Department of Commerce, Room 2029–B, Washington, DC 20230. Phone: 202–482–2896.

SUPPLEMENTARY INFORMATION: The U.S. Department of Commerce and the Iraqi Ministry of Trade established the Dialogue as a bilateral forum to facilitate private sector business growth in Iraq and to strengthen trade and investment ties between the United States and Iraq. During Secretary of Commerce Carlos M. Gutierrez's visit to Iraq in July 2006, he joined Iraqi Minister of Trade Dr. Abd-al-Falah al-Sudani in signing the Joint Statement on Commercial Cooperation, which formally provided for the establishment of the Dialogue. In their next meeting in September 2006, the Secretary and the Minister approved and signed the Terms of Reference for the Dialogue.

The U.S. Secretary of Commerce and the Iraqi Minister of Trade co-chair the Dialogue. The Dialogue consists of a U.S. Section and an Iraqi Section. Each Section consists of members from the private sector, representing the views and interests of the private sector business community. Each Party appoints the members to its respective Section. The Sections provide advice and counsel to the U.S. Department of Commerce and the Iraqi Ministry of Trade that reflect private sector views, needs, and concerns regarding private sector business development in Iraq and enhanced bilateral commercial ties that could form the basis for expanded trade between the United States and Iraq. The Dialogue will exchange information and encourage bilateral discussions that address the following areas:

—Factors that affect the growth of private sector business in Iraq, including disincentives to trade and investment and regulatory obstacles to job creation and investment growth;

—Initiatives that the Government of Iraq might take, such as enacting, amending, enforcing, or repealing laws and regulations, to promote private sector business growth in Iraq;

—Promotion of business opportunities in both Iraq and the United States, and identification of opportunities for U.S. and Iraqi firms to work together; and

—Attracting U.S. businesses to opportunities in Iraq and serving as a catalyst for Iraqi private sector growth.

The members will represent a cross-section of American business with an emphasis, to the extent possible, on agribusiness and food processing, financial services and private equity, construction and housing, information technology, consumer products, and manufacturing industries. The following sectors currently are represented on the U.S. Section of the USIBD: Telecommunications; petroleum; construction equipment; financial; and logistics. Applications to represent any sector will be considered. However, in an effort to expand the sectors represented on the U.S. Section of the Dialogue, the Department particularly encourages applications from persons who would represent the consumer goods and services, private equity, health, aviation, and electricity sectors.

Members serve in a representative capacity representing the views and interests of their particular industries. Members are not special government employees, and receive no compensation for their participation in Dialogue activities. Only appointed members may participate in official Dialogue meetings; substitutes and alternates will not be designated. Section members serve for three-year terms, but may be reappointed. U.S. Section members serve at the discretion of the U.S. Department of Commerce.

The U.S. Department of Commerce is currently seeking candidates for four membership positions on the U.S. Section of the Dialogue. Candidates will be evaluated based on: Their interest in the Iraqi market; export/investment experience; contribution to diversity based on size of company, geographic location, and sector; and ability to initiate and be responsible for activities in which the Business Dialogue will be active.

In order to be eligible for membership in the U.S. section, potential candidates shall be:

—A U.S. citizen residing in the United States, or able to travel to the United States or other location to attend official Business Dialogue meetings;

—The President or CEO (or comparable level of responsibility) of a private sector company; if the company is very large, the head of a sizeable operating unit of that company; or the head of a non-profit entity, such as a trade or industry association, who possesses unique technical expertise, an outstanding reputation, and the ability to provide counsel with respect to private sector business development in Iraq; and

—Not a registered foreign agent under the Foreign Agents Registration Act of 1938, as amended.

Members will be selected on the basis of who best will carry out the objectives of the Business Dialogue as stated in the Terms of Reference establishing the Dialogue. (The Terms of Reference are available from the point of contact listed above.) Recommendations for appointment will be made to the Secretary of Commerce. All candidates will be notified of whether they have been selected.

To be considered for membership, please submit the following information as instructed in the addresses and dates captions above: Name(s) and title(s) of the individual(s) requesting consideration; name and address of company or non-profit entity to be represented; size of the company or non-profit entity; description of relevant product, service, or technical expertise; size of company's export trade, investment, and/or international program experience; nature of operations or interest in Iraq; and a brief statement of why the candidate should be appointed, including information about the candidate's ability to initiate and be responsible for activities in which the Business Dialogue will be active.

Dated: January 2, 2008.

Susan Hamrock Mann,

Director, Iraq Investment and Reconstruction Task Force.

[FR Doc. E9–59 Filed 1–6–09; 8:45 am]

BILLING CODE 3510–DA–P

COMMISSION OF FINE ARTS

Notice of Meeting

The next meeting of the U.S. Commission of Fine Arts is scheduled for 22 January 2008, at 10 a.m. in the Commission's offices at the National Building Museum, Suite 312. Judiciary Square, 401 F Street, NW., Washington, DC 20001–2728. Items of discussion may include buildings, parks and memorials.

Draft agendas and additional information regarding the Commission are available on our Web site: *http://www.cfa.gov.* Inquiries regarding the agenda and requests to submit written or oral statements should be addressed to Thomas Luebke, Secretary, U.S. Commission of Fine Arts, at the above address, or call 202–504–2200. Individuals requiring sign language interpretation for the hearing impaired should contact the Secretary at least 10 days before the meeting date.

Dated in Washington DC, December 22, 2008.

Thomas Luebke,

Secretary.

[FR Doc. E8–31154 Filed 1–6–09; 8:45 am]

BILLING CODE 6330–01–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Business Board (DBB)

AGENCY: Department of Defense.

ACTION: Notice of meeting.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces the following Federal advisory committee meeting of the Defense Business Board (DBB).

DATES: The public meeting of the Board will be held on Thursday, January 22, 2009, beginning at 11:30 a.m. and ending at 12 p.m.

ADDRESSES: Pentagon, Room 3E863, Washington, DC (escort required, see below).

FOR FURTHER INFORMATION CONTACT: The Board's Designated Federal Officer (DFO) is Phyllis Ferguson, Defense Business Board, 1155 Defense Pentagon, Room 3C288, Washington, DC 20301–1155, *Phyllis.ferguson@osd.mil*, (703) 695–7563. For meeting information please contact Debora Duffy, Defense Business Board, 1155 Defense Pentagon, Room 3C288, Washington, DC 20301–1155, *Debora.duffy@osd.mil*, (703) 697–2168.

SUPPLEMENTARY INFORMATION:

(a) Background

The mission of the DBB is to advise the Secretary of Defense on effective strategies for implementation of best business practices of interest to the Department of Defense.

(b) Availability of Materials for the Meeting

A copy of the draft agenda for the January 22, 2009, meeting may be obtained from the Board's Web site at *http://www.defenselink.dod/dbb* under ''Meeting Materials.''

(c) Public's Accessibility to the Meeting

Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is on a first-come basis. Members of the public who wish to attend the meeting must contact Ms. Duffy at the number listed in this FR Notice no later than noon on Thursday, January 15th to arrange a Pentagon escort. Public attendees are required to arrive at the Pentagon Metro Entrance by 11 a.m. and complete security screening by 11:15 a.m. Security screening requires two forms of identification: (1) A government-issued photo I.D., and (2) any type of secondary I.D. which verifies the individual's name (*i.e.* debit card, credit card, work badge, social security card).

Special Accommodations: Individuals requiring special accommodations to access the public meeting should contact Ms. Duffy at least five business days prior to the meeting so that appropriate arrangements can be made.

(d) Procedures for Providing Public Comments

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written comments to the Board about its mission and topics pertaining to this public session.

Written comments are accepted until the date of the meeting; however, written comments should be received by the DFO at least five business days prior to the meeting date so that the comments may be made available to the Board for their consideration prior to the meeting. Written comments should be submitted via e-mail to the address for the DFO given in this notice in the following formats (Adobe Acrobat, WordPerfect, or Word format). Please note: Since the Board operates under the provisions of the Federal Advisory Committee Act, as amended, all public presentations will be treated as public documents and will be made available for public inspection, up to and including being posted on the Board's Web site.

Dated: December 30, 2008.

Patricia Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E9–38 Filed 1–6–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DOD–2008–OS–0171]

Privacy Act of 1974; System of Records

AGENCY: National Reconnaissance Office, DoD.

ACTION: Notice to Delete a System of Records.

SUMMARY: The National Reconnaissance Office is deleting a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This action will be effective without further notice on February 6, 2009 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the FOIA/Privacy Official, National Reconnaissance Office, Information Access and Release, 14675 Lee Road, Chantilly, VA 20151–1715.

FOR FURTHER INFORMATION CONTACT: Contact the FOIA/NRO Privacy Official at (703) 227–9128.

SUPPLEMENTARY INFORMATION: The National Reconnaissance Office notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The National Reconnaissance Office proposes to delete a system of records notice in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The proposed deletion is not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: December 30, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison, Officer, Department of Defense.

QNRO–3

SYSTEM NAME:

Diet and Nutrition Evaluation Records (August 22, 2000, 65 FR 50969).

REASON:

These records are no longer kept; the data that was in the system did not contain personal information, but only information on the nutritional value of foods.

[FR Doc. E9–39 Filed 1–6–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2008–OS–0170]

Privacy Act of 1974; Systems of Records

AGENCY: Defense Finance and Accounting Service, DoD.

ACTION: Notice to Alter a System of Records.

SUMMARY: The Defense Finance and Accounting Service (DFAS) proposes to alter a system of records notice in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This Action will be effective without further notice on February 6, 2009 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the FOIA/PA Program Manager, Corporate Communications and Legislative Liaison, Defense Finance and Accounting Service, 8899 E. 56th Street, Indianapolis, IN 46249–0150.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Krabbenhoft at (303) 589–3510.

SUPPLEMENTARY INFORMATION: The Defense Finance and Accounting Service notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on December 30, 2008, to the House Committee on Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated December 12, 2000, 65 FR 239.

Dated: December 30, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

T7347b

SYSTEM NAME:

Defense Military Retiree and Annuity Pay System (February 20, 2003, 68 FR 8230).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with ''Director of Continuing Government Activity, Defense Finance and Accounting Service—Cleveland, 1240 East Ninth Street, Cleveland, OH 44199–2055.''

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with ''Military retirees, their dependents, their survivors, former spouses and abused dependents.''

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with ''Name, Social Security Number (SSN), address, telephone number, master pay files, court orders, Application for Transitional Compensation, payment schedules, case processing record, direct deposit forms, annual certification form, acknowledgment action form, correspondence and other supporting documents relating to entitlements and deductions of military retirees, annuitants, dependents, former spouses and abused dependents.''

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with ''5 U.S.C. 301, Departmental Regulations; 10 U.S.C., Chapters 53, 61, 63, 65, 67, 69, 71, 73, 74; 10 U.S.C. Sec. 1059, and 1408(h); 38 U.S.C. Sec. 1311 and 1313; Pub. L. 92–425; Pub. L. 102–484 Sec. 653; Pub. L. 103–160 Sec. 554 and 1058; Pub. L. 105–261, Sec. 570; DoDI 1342.24, Transitional Compensation for Abused Dependents; DoD Financial Management Regulation 7000.14–R, Volume 7B and E.O. 9397 (SSN).''

PURPOSE(S):

Delete entry and replace with ''To maintain pay and personnel information for use in the computation of military retired pay survivor annuity pay and to make payments to spouses, former spouses and other dependents who are victims of abuse.''

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Add a new routine use ''To receive approved requests from the military services to make payments of transitional compensation to military member's spouses, former spouses, and other dependents that are determined to be victims of abuse.''

* * * * *

STORAGE:

Delete entry and replace with ''Maintained in file folders and electronic storage media.''

RETRIEVABILITY:

Delete entry and replace with ''Name and Social Security Number (SSN).''

RETENTION AND DISPOSAL:

Delete entry and replace with ''Disposition for Retired and Annuitant Pay records range from 30 days to 56 years. The administrative records such as, change of address, electronic messages or tax records, that are not pay affecting, are destroyed using retention of 30 days to less than 6 years. All pay affecting documents such as retirement documents, account computation information or entitlement/eligibility records are retained for six years or more and the pay histories are retained for 56 years. Records are destroyed by tearing, shredding, pulping, macerating, burning, or degaussing the electronic storage media.''

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''Policy official: Director of Continuing Government Activity, Defense Finance and Accounting Service Cleveland, (DFAS–PD/CL), 1240 East Ninth Street, Cleveland, OH 44199–2055.

Record holder: Systems Manager, Lockheed Martin, Defense Finance and Accounting Service—Cleveland, 1240 East Ninth Street, Cleveland, OH 44199–2055.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether information about them is contained in this record system should address written inquiries to the Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 8899 East 56th Street, Indianapolis, IN 46249–0150.

The requester should be able to provide sufficient proof of identity, such

as name, Social Security Number (SSN), place of employment, or other information available from the record itself.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about them contained in this system should address written inquiries to Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 8899 East 56th Street, Indianapolis, IN 46249–0150.

The requester should be able to provide sufficient proof of identity, such as name, Social Security Number, place of employment, or other information available from the record itself.''

CONTESTING RECORD PROCEDURES:

Delete entry and replace with ''The DFAS rules for accessing records, for contesting contents and appealing initial agency determinations are published in DFAS Regulation 5400.11–R; 32 CFR part 324; or may be obtained from the Freedom of Information/ Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 8899 East 56th Street, Indianapolis, IN 46249–0150.''

RECORD SOURCE CATEGORIES:

Delete entry and replace with ''From the individual concerned; other DoD Components such as Army, Navy, Air Force and Marine Corps; state or local governments; members' survivors such spouses, other dependents or guardians of the member or dependent children; former spouses, private law firms which are executors of estates in casualty cases, financial, educational and medical institutions, and other federal government agencies such as the Department of Veterans Affairs, Social Security Administration, and Internal Revenue Service.''

* * * * *

T7347b

SYSTEM NAME:

Defense Military Retiree and Annuity Pay System Records.

SYSTEM LOCATION:

Director of Continuing Government Activity, Defense Finance and Accounting Service—Cleveland, 1240 East Ninth Street, Cleveland, OH 44199–2055.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Military retirees, their dependents, their survivors, former spouses and abused dependents.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, Social Security Number (SSN), address, telephone number, master pay files, court orders, Application for Transitional Compensation, payment schedules, case processing record, direct deposit forms, annual certification form, acknowledgment action form, correspondence and other supporting documents relating to entitlements and deductions of military retirees, annuitants, dependents, former spouses and abused dependents.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; 10 U.S.C., Chapters 53, 61, 63, 65, 67, 69, 71, 73, 74; 10 U.S.C. Sec. 1059, and 1408(h); 38 U.S.C. Sec. 1311 and 1313; Pub. L. 92–425; Pub. L. 102–484 Sec. 653; Pub. L. 103–160 Sec. 554 and 1058; Pub. L. 105–261, Sec. 570; DoDI 1342.24, Transitional Compensation for Abused Dependents; DoD Financial Management Regulation 7000.14–R, Volume 7B and E.O. 9397 (SSN).

PURPOSE(S):

To maintain pay and personnel information for use in the computation of military retired pay survivor annuity pay and to make payments to spouses, former spouses and other dependents who are victims of abuse.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

Records are provided to the Internal Revenue Service for normal wage and tax withholding.

Disclosures are made to the Department of Veterans Affairs (DVA) regarding establishments, changes and discontinuing of DVA compensation to retirees and annuitants.

Information is provided to individuals authorized to receive retired and annuitant payments on behalf of retirees or annuitants.

The Army Emergency Relief, Navy-Marine Corps Relief Society and Air Force Assistance Fund to process allotments for repayment of interest-free loans from the society and retiree charitable allotments in support of fund drives initiated by the Secretaries of the Army, Navy, and Air Force. The information will be used to process allotments on behalf of service members and retirees.

To officials and employees of the American Red Cross in the performance of their official duties relating to the assistance of the members and their dependents and relatives.

To former spouses for purposes of providing information, consistent with the requirements of 10 U.S.C. 1450(f)(3), regarding Survivor Benefit Plan coverage.

To spouses for purposes of providing information, consistent with the requirements of 10 U.S.C. 1448(a), regarding Survivor Benefit Plan coverage.

To receive approved requests from the military services to make payments of transitional compensation to military member's spouses, former spouses, and other dependents that are determined to be victims of abuse.

The DoD 'Blanket Routine Uses' published at the beginning of the DFAS compilation of systems of records notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Maintained in file folders and electronic storage media.

RETRIEVABILITY:

Name and Social Security Number (SSN).

SAFEGUARDS:

Records are maintained in a controlled facility. Physical entry is restricted by the use of locks, guards, and is accessible only to authorized personnel. Access to records is limited to person(s) responsible for servicing the record in performance of their official duties and who are properly screened and cleared for need-to-know. Access to computerized data is restricted by passwords, which are changed periodically.

RETENTION AND DISPOSAL:

Disposition for Retired and Annuitant Pay records range from 30 days to 56 years. The administrative records such as, change of address, electronic messages or tax records, that are not pay affecting, are destroyed using retention of 30 days to less than 6 years. All pay affecting documents such as retirement documents, account computation information or entitlement/eligibility records are retained for six years or more and the pay histories are retained for 56 years. Records are destroyed by tearing, shredding, pulping, macerating, burning, or degaussing the electronic storage media.

SYSTEM MANAGER(S) AND ADDRESS:

Policy official: Director of Continuing Government Activity, Defense Finance and Accounting Service Cleveland, (DFAS–PD/CL), 1240 East Ninth Street, Cleveland, OH 44199–2055.

Record holder: Systems Manager, Lockheed Martin, Defense Finance and Accounting Service—Cleveland, 1240 East Ninth Street, Cleveland, OH 44199–2055.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about them is contained in this record system should address written inquiries to the Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 8899 East 56th Street, Indianapolis, IN 46249–0150.

The requester should be able to provide sufficient proof of identity, such as name, Social Security Number, place of employment, or other information available from the record itself.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about them contained in this system should address written inquiries to Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 8899 East 56th Street, Indianapolis, IN 46249–0150.

The requester should be able to provide sufficient proof of identity, such as name, Social Security Number, place of employment, or other information available from the record itself.

CONTESTING RECORD PROCEDURES:

The DFAS rules for accessing records, for contesting contents and appealing initial agency determinations are published in DFAS Regulation 5400.11–R; 32 CFR part 324; or may be obtained from the Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 8899 East 56th Street, Indianapolis, IN 46249–0150.

RECORD SOURCE CATEGORIES:

From the individual concerned; other DoD Components such as Army, Navy, Air Force and Marine Corps; state or local governments; members' survivors such as spouses, other dependents or guardians of the member or dependent children; former spouses, private law firms which are executors of estates in casualty cases, financial, educational and medical institutions, and other federal government agencies such as the Department of Veterans Affairs, Social Security Administration, and Internal Revenue Service.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E9–41 Filed 1–6–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2008–OS–0169]

Privacy Act of 1974; System of Records

AGENCY: National Security Agency/Central Security Service, DoD.

ACTION: Notice to Alter a System of Records.

SUMMARY: The National Security Agency/Central Security Service is proposing to alter a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on February 6, 2009 unless comments are received which result in a contrary determination.

ADDRESSES: Send comments to the National Security Agency/Central Security Service, Office of Policy, 9800 Savage Road, Suite 6248, Ft. George G. Meade, MD 20755–6248.

FOR FURTHER INFORMATION CONTACT: Ms. Anne Hill at (301) 688–6527.

SUPPLEMENTARY INFORMATION: The National Security Agency/Central Security Service systems of records notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on December 19, 2008, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: December 30, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

GNSA 09

SYSTEM NAME:

NSA/CSS Personnel File (August 9, 1993, 58 FR 42303).

CHANGES:

* * * * *

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with ''Civilian employees, personnel under contract, military assignees, dependents of NSA/CSS personnel assigned to field elements, individuals integrated into the cryptologic reserve program, custodial and commercial services personnel.''

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with ''File contains personnel papers and forms including but not limited to applications, transcripts, correspondence, notices of personnel action, performance appraisals, internal staffing resume, professionalization documentation and correspondence, training forms, temporary duty, letters of reprimand, special assignment documentation, letters of commendation, promotion documentation, field assignment preference, requests for transfers, permanent change of station, passport, transportation, official orders, awards, suggestions, pictures, complaints, separation, retirement, time utilization, scholarship/fellowship or other school appointments, military service, reserve status, military check in/out sheets, military orders, security appraisal, career battery and other test results, language capability, military personnel utilization survey, work experience, notes and memoranda on individual aspects of performance, productivity and suitability, information on individual eligibility to serve on various boards and committees, emergency loan records, other information relevant to personnel management, housing information where required.''

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with ''National Security Agency Act of 1959, Public Law 86–36 (codified at 50 U.S.C. Section 402 note); Title of the United States Code and certain implementing Office of Personnel Management regulations contained within 5 CFR Part 293, Personnel Records; 10 U.S.C. 1124, Cash awards for disclosures, suggestions, inventions, and scientific

achievements; 44 U.S.C. 3101, Records management by agency heads; general duties and E.O. 9397 (SSN).''

* * * * *

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Add new routine use ''To the Office of the Director of National Intelligence (ODNI) for Intelligence Community aggregate workforce planning, assessment, and reporting purposes. Records provided to the ODNI for this routine use will not include any individual's name or Social Security Number (SSN).''

* * * * *

STORAGE:

Delete entry and replace with ''Paper records in file folders and electronic storage media.''

RETRIEVABILITY:

Delete entry and replace with ''By name, Social Security Number or Employee Identification Number.''

SAFEGUARDS:

Delete entry and replace with ''Buildings are secured by a series of guarded pedestrian gates and checkpoints. Access to facilities is limited to security-cleared personnel and escorted visitors only. Within the facilities themselves, access to paper and computer printouts are controlled by limited-access facilities and lockable containers. Access to electronic means is limited and controlled by computer password protection. Access to information is limited to those individuals authorized and responsible for personnel management or supervision.''

* * * * *

SYSTEM MANAGER(S):

Delete entry and replace with ''The Associate Director, Human Resources, National Security Agency/Central Security Service, Ft. George G. Meade, MD 20755–6000.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000.

Written inquiries should contain the individual's full name, Social Security Number (SSN) and mailing address.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about themselves contained in this system should address written inquiries to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000.

Written inquiries should contain the individual's full name, Social Security Number (SSN) and mailing address.''

CONTESTING RECORD PROCEDURES:

Delete entry and replace with ''The NSA/CSS rules for contesting contents and appealing initial determinations are published at 32 CFR part 322 or may be obtained by written request addressed to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000.''

* * * * *

GNSA 09

SYSTEM NAME:

NSA/CSS Personnel File.

SYSTEM LOCATION:

Primary location: National Security Agency/Central Security Service, Ft. George G. Meade, MD 20755–6000.

Decentralized segments: Each staff, line, contract and field element and supervisor as authorized and appropriate.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Civilian employees, personnel under contract, military assignees, dependents of NSA/CSS personnel assigned to field elements, individuals integrated into the cryptologic reserve program, custodial and commercial services personnel.

CATEGORIES OF RECORDS IN THE SYSTEM:

File contains personnel papers and forms including but not limited to applications, transcripts, correspondence, notices of personnel action, performance appraisals, internal staffing resume, professionalization documentation and correspondence, training forms, temporary duty, letters of reprimand, special assignment documentation, letters of commendation, promotion documentation, field assignment preference, requests for transfers, permanent change of station, passport, transportation, official orders, awards, suggestions, pictures, complaints, separation, retirement, time utilization, scholarship/fellowship or other school appointments, military service, reserve status, military check in/out sheets, military orders, security appraisal, career battery and other test results, language capability, military personnel utilization survey, work experience, notes and memoranda on individual aspects of performance, productivity and suitability, information on individual eligibility to serve on various boards and committees, emergency loan records, other information relevant to personnel management, housing information where required.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

National Security Agency Act of 1959, Public Law 86–36 (codified at 50 U.S.C. Section 402 note); Title of the United States Code and certain implementing Office of Personnel Management regulations contained within 5 C.F.R Part 293, Personnel Records; 10 U.S.C. 1124, Cash awards for disclosures, suggestions, inventions, and scientific achievements; 44 U.S.C. 3101, Records management by agency heads; general duties and E.O. 9397 (SSN).

PURPOSE(S):

To support the personnel management program; personnel training and career development; personnel planning, staffing and counseling; administration and personnel supervision; workforce study and analysis; manpower requirements studies; emergency loan program; and training curricula planning and research.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To gaining employers or to financial institutions when individual has applied for credit; to contractor employees to make determinations as noted in the purpose above; to hearing examiners; the judicial branch or to other gaining government organization as required and appropriate; biographical information may be provided to the White House as required in support of the Senior Cryptologic Executive Service awards program.

To the Office of the Director of National Intelligence (ODNI) for Intelligence Community aggregate workforce planning, assessment, and reporting purposes. Records provided to the ODNI for this routine use will not include any individual's name or Social Security Number (SSN).

The DoD 'Blanket Routine Uses' set forth at the beginning of the NSA/CSS' compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and electronic storage media.

RETRIEVABILITY:

By name, Social Security Number or Employee Identification Number.

SAFEGUARDS:

Buildings are secured by a series of guarded pedestrian gates and checkpoints. Access to facilities is limited to security-cleared personnel and escorted visitors only. Within the facilities themselves, access to paper and computer printouts are controlled by limited-access facilities and lockable containers. Access to electronic means is limited and controlled by computer password protection. Access to information is limited to those individuals authorized and responsible for personnel management or supervision.

RETENTION AND DISPOSAL:

Primary System—Those forms, notices, reports and memoranda considered to be of permanent value or required by law or regulation to be preserved are retained for the period of employment or assignment and then forwarded to the gaining organization or retained indefinitely. If the action is separation or retirement, these items are forwarded to the Office of Personnel Management or retired to the Federal Records Center at St. Louis as appropriate. Those items considered to be relevant for a temporary period only are retained for that period and either transferred with the employee or assignee or destroyed when they are no longer relevant or at time of separation or retirement. Computerized portion is purged and updated as appropriate. Records relating to adverse actions, grievances, excluding EEO complaints and performance-based actions, except SF–50s, will be retained for four years. Personnel summary, training, testing and past activity segments are retained permanently. All other portions deleted at end of tenure.

Decentralized System—Files are transferred to gaining organization or destroyed upon separation as appropriate. Computer listings of personnel assigned to an organization are destroyed upon receipt of updated listings.

SYSTEM MANAGER(S) AND ADDRESS:

The Associate Director, Human Resources, National Security Agency/Central Security Service, Ft. George G. Meade, MD 20755–6000.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000.

Written inquiries should contain the individual's full name, Social Security Number (SSN) and mailing address.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000.

Written inquiries should contain the individual's full name, Social Security Number (SSN) and mailing address.

CONTESTING RECORD PROCEDURES:

The NSA/CSS rules for contesting contents and appealing initial determinations are published at 32 CFR part 322 or may be obtained by written request addressed to the National Security Agency/Central Security Service, Freedom of Information Act/Privacy Act Office, 9800 Savage Road, Ft. George G. Meade, MD 20755–6000.

RECORD SOURCE CATEGORIES:

Forms used to collect and process individual for employment, access or assignment, forms and memoranda used to request personnel actions, training awards, professionalization, transfers, promotion, organization and supervisor reports and requests, educational institutions, references, Office of Personnel Management and other governmental entities as appropriate, and other sources as appropriate and required.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Portions of this file may be exempt pursuant to 5 U.S.C. 552a(k)(1), (k)(4), (k)(5), and (k)(6), as applicable.

An exemption rule for this record system has been promulgated according to the requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) and published in 32 CFR part 322. For additional information contact the system manager.

[FR Doc. E9–42 Filed 1–6–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID USAF–2008–0063]

Privacy Act of 1974; System of Records

AGENCY: Department of the Air Force, DoD.

ACTION: Notice to Delete a System of Records.

SUMMARY: The Department of the Air Force proposes to delete a system of records notice in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on March 9, 2009 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Air Force Privacy Act Officer, Office of Warfighting Integration and Chief Information Officer, SAF/XCISI, 1800 Air Force Pentagon, Suite 220, Washington, DC 20330–1800.

FOR FURTHER INFORMATION CONTACT: Mr. Kenneth Brodie at (703) 696–7557.

SUPPLEMENTARY INFORMATION: The Department of the Air Force systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The Department of the Air Force proposes to delete a system of records notice in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The proposed deletion is not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: December 30, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

F036 AFPC O

SYSTEM NAME:

Aviation Service Historical Data File (June 11, 1997, 62 FR 31793).

REASON:

This is a duplicate system that was integrated with F011 AF XO A, Aviation Resource Management System (ARMS) (December 26, 2002, 67 FR 78777). There should be only one system for historical Aviation Service Records.

[FR Doc. E9–40 Filed 1–6–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Termination of an Environmental Impact Statement for the Construction and Operation of a 300–MW Coal-Fired Electric Generating Unit Proposed by Wisconsin Power and Light Company Near Cassville in Grant County, WI

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of Termination.

SUMMARY: The St. Paul District, Corps of Engineers (Corps) is canceling the preparation of a federal Environmental Impact Statement (EIS) for the proposal by Wisconsin Power and Light Company (WPL) to conduct work below the ordinary high water mark of the Mississippi River, a navigable water of the U.S., and to discharge dredged or fill material into waters of the U.S. to facilitate the construction and operation of a 300 megawatt (MW) baseload coal-fired electric generating unit, referred to as NED 3, near Cassville in Grant County, WI. The Corps has terminated its review of the WPL permit application due to WPL's withdrawal of their permit application on November 21, 2008.

ADDRESSES: Questions concerning this termination notice can be addressed to Ms. Tamara Cameron, Regulatory Branch by letter at U.S. Army Corps of Engineers, 190 Fifth Street East, Suite 401, St. Paul, MN 55101–1638, by telephone or by e-mail at *tamara.e.cameron@usace.army.mil*.

FOR FURTHER INFORMATION CONTACT: Ms. Tamara Cameron, (651) 290–5197.

SUPPLEMENTARY INFORMATION: On January 17, 2008 the Corps published in the **Federal Register** (73 FR 3241) a notice of intent to prepare an EIS jointly with the Public Service Commission of Wisconsin (PSCW). Scoping meetings were held in January and March, 2008 and a notice of availability of the draft EIS was published in the **Federal Register** (73 FR 30099) on May 23, 2008.

In July 2008, WPL modified their proposal so that work would be done under and over the Mississippi River, but not in the River, and there would be no discharges of dredged or fill material into any waters of the U.S. On November 21, 2008, WPL withdrew their permit application, and consequently the Corps has decided to terminate the EIS.

If WPL submits a subsequent permit application for work over and/or under the Mississippi River, as detailed in their most recent proposal, the Corps would evaluate the application under the terms of a Nationwide Permit, as applicable, or prepare an Environmental Assessment as part of its standard permit application review.

Dated: December 22, 2008.

Jon L. Christensen,

Colonel, Corps of Engineers, District Engineer.

[FR Doc. E9–36 Filed 1–6–09; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before February 6, 2009.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503 or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Acting IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: January 2, 2009.

Stephanie Valentine,

Acting IC Clearance Official, Regulatory Information Management Services, Office of Management.

Federal Student Aid

Type of Review: Extension.

Title: Teacher Education Assistance for College and Higher Education Grant Eligibility Regulations.

Frequency: On Occasion; Annually.

Affected Public: Individuals or household; Businesses or other for-profit; Not-for-profit institutions; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 211,097.

Burden Hours: 35,695.

Abstract: Eligible and participating institutions of higher education who participate in the TEACH Grant program operate the program consistent with these regulations. Information is necessary to make determinations regarding program compliance with the implementing regulations. This request is for approval of reporting and recordkeeping requirements contained in the attached proposed regulations related to the TEACH Grant administrative requirements for the Title IV, HEA programs. The information collection requirements in these proposed regulations are necessary to determine eligibility to receive program benefits and to prevent fraud and abuse of program funds.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3901. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal

Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E9–63 Filed 1–6–09; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[P–349–158; P–2407–126]

Alabama Power Company; Notice of Application for Temporary Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

December 30, 2008.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Request for drought-based temporary variance of the Martin Project rule curve and minimum flow releases at the Yates and Thurlow Project.

b. *Project Nos.:* 349–158 and 2407–126.

c. *Date Filed:* December 29, 2008.

d. *Applicant:* Alabama Power Company.

e. *Name of Projects:* Martin Hydroelectric Project (P–349) and Yates and Thurlow Hydroelectric Project (P–2407).

f. *Location:* The Martin Dam Project is located on the Tallapoosa River in the counties of Coosa, Elmore and Tallapoosa, Alabama. The Yates and Thurlow Project is located on the Tallapoosa River in the counties of Tallapoosa and Elmore Counties, Alabama.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. Jim Crew, Alabama Power Company, P.O. Box 2641, Birmingham, Alabama 35291, Tel: (205) 257–4265.

i. *FERC Contact:* Ms. Rachel Price, (202) 502–8907; e-mail: *rachel.price@ferc.gov.*

j. *Deadline for filing comments, motions to intervene and protests:* January 30, 2009.

Please include the project numbers (P–349–158 and P–2407–126) on any comments or motions filed. All documents should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Comments, protests, and interventions may be filed electronically via the Internet, see 18 CFR 385.2001 (a)(1)(iii) and the instructions on the Commission's Web site under the ''e-filing'' link. The Commission strongly encourages electronic filings. In lieu of electronic filing, an original and eight copies of all documents may be mailed to the Secretary at the address above.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Request:* Alabama Power is requesting a drought-based temporary variance to the Martin Project rule curve. The rule curve variance would be in effect from the date of Commission approval to May 1, 2009, and would include: (1) Maintaining a winter pool elevation 3 feet higher than normal, at elevation 483 feet instead of elevation 480 feet; (2) maintaining the winter pool elevation earlier than normal, upon Commission approval; (3) initiating the filling process earlier than normal, beginning January 15th instead of February 17th; and (4) reaching and maintaining summer pool elevation earlier than normal, beginning April 1st rather than April 29th. In association with the Martin rule curve variance, the minimum flows from the Thurlow reservoir (P–2407) would be temporarily modified as follows until May 1, 2009: (1) Discharge would be no less than 350 cubic feet per second (cfs) until the Martin Reservoir elevation reaches the existing rule curve; (2) when the reservoir elevation is at or above the existing rule curve but below the temporary rule curve, Alabama Power would discharge the greater of 350 cfs or inflow at the upstream Heflin gage; and (3) when Martin Reservoir elevation is at or above the temporary rule curve, Alabama Power would discharge no less than 1,200 cfs from Thurlow.

l. *Location of the Application:* The filing is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426 or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docsfiling/esubscription.asp* to be notified vial e-mail or new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or e-mail *ferconlinesupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. Any filing must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as applicable, and the Project Number of the particular application to which the filing refers.

p. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

q. Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov* under the ''e-Filing'' link.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–31436 Filed 1–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13332–000]

Raccourci Cut-off Project, LLC; Notice of Preliminary Permit Applications Accepted for Filing and Soliciting Comment, Motions To Intervene, and Competing Applications

December 30, 2008.

On November 21, 2008, Raccourci Cut-off Project, LLC filed an application, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Raccourci Cut-off Project, to be located on the Mississippi River in Pointe Coupee Parish and West Feliciana Parish, Louisiana.

The proposed Raccourci Cut-off Project consists of: (1) 6,336 proposed 40 kilowatt Free Flow generating units having a total installed capacity of 253 megawatts, (2) a proposed transmission line, and (3) appurtenant facilities. The Raccourci Cut-off Project would have an average annual generation of 1,110 gigawatt-hours, and would be sold to a local utility.

Applicant Contact: Ms. Ramya Swaminathan, Free Flow Power Corporation, 33 Commercial Street, Gloucester, MA 01930, phone (978) 226–1531. *FERC Contact:* Henry Woo, (202) 502–8872.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''eFiling'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the ''eLibrary'' link of the Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13332) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–31435 Filed 1–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 8646–043]

Robert N. Fackrell; Mink Creek Hydro LLC; Notice of Application for Transfer of License, and Soliciting Comments, Motions To Intervene, and Protests

December 30, 2008.

On October 31, 2008, Robert N. Fackrell (Transferor) and Mink Creek Hydro LLC (Transferee) filed an application, for transfer of license of the Mink Creek Hydroelectric Project, located on Mink Creek in Franklin County, Idaho.

Applicants seek Commission approval to transfer the license for the Mink Creek Hydro Project to Mink Creek Hydro LLC.

Applicant Contact: Mr. Robert N. Fackrell, Corporate Manager, Mink Creek Hydro LLC, P.O. Box 1, Preston, ID 83263, phone (208) 852–1522.

FERC Contact: Patricia W. Gillis, (202) 502–8735.

Deadline for filing comments, motions to intervene: 30 days from the issuance of this notice. Comments, motions to intervene, and notices of intent may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–8646) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–31428 Filed 1–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–37–000]

Gulf South Pipeline Company, LP; Notice of Request Under Blanket Authorization

December 30, 2008.

Take notice that on December 16, 2008, Gulf South Pipeline Company, LP, (Gulf South), 9 Greenway Plaza, Suite 2800, Houston, Texas 77046, filed in Docket No. CP09–37–000, an application pursuant to sections 157.205 and 157.216 of the Commission's Regulations under the Natural Gas Act (NGA) as amended, for permission and approval to abandon in place and by removal approximately 11.5 miles of inactive 20-inch diameter pipeline and associated appurtenances in various Eugene Island blocks, offshore Louisiana, under Gulf South's blanket certificate issued in Docket No. CP82–430–000,[1] all as more fully set forth in the application which is on file with the Commission and open to the public for inspection.

Gulf South proposes to abandon in approximately 11.5 miles of 20-inch diameter pipeline which originates at a producer platform in Eugene Island Block 57 at the upstream connection to a meter station and appurtenances to a point of connection at a Eugene Island Block 32 platform with an existing Gulf South offshore pipeline, including platform riser, pig receiver, and associated appurtenances. Gulf South states that it would abandon all of the 11.5 miles of pipeline in place, except for approximately 1,675 feet in the Atchafalaya Pass Fairway in Eugene Island Block 32, which Gulf South would remove. Gulf South also states that the facilities it proposes to abandon have been inactive since 2003 and their proposed abandonment would not affect or degrade service to Gulf South's existing customers, nor would it have an operational effect on Gulf South's system. Gulf South further states that it would cost approximately $2,326,500 to remove pipeline and appurtenant facilities in this proceeding.

Any questions concerning this application may be directed to J. Kyle Stephens, Vice President, Regulatory Affairs, Gulf South Pipeline Company, LP, 9 Greenway Plaza, Suite 2800, Houston, Texas 77046; telephone 713–479–8033 or by e-mail: *kyle.stephens@bwpmlp.com.*

[1] 20 FERC ¶ 62,416 (1982).

This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, please contact FERC *Online Support at FERC OnlineSupport@ferc.gov* or call toll-free at (866)206–3676, or, for TTY, contact (202)502–8659. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages intervenors to file electronically.

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–31437 Filed 1–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP09–27–000]

Southern Natural Gas Company; Notice of Intent To Prepare an Environmental Assessment for the Proposed Southern Natural Gas 2008 Abandonment and Modification Project and Request for Comments on Environmental Issues

December 31, 2008.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the potential environmental impacts of Southern Natural Gas Company's (Southern) 2008 Abandonment and Replacement Project involving the in-place abandonment of approximately 97 miles of pipeline in Mississippi and Alabama. The pipeline, which is part of Southern's North Main Loop Line, consists of 18-inch-diameter to 24-inch-diameter pipe, would be abandoned in six segments. In addition, Southern proposes to abandon three compressor units at the Onward Compressor Station in Sharkey County, Mississippi. The EA will be used by the Commission in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project. Your input will help determine which issues need to be evaluated in the EA. Please note that the scoping period will close on January 30, 2009. Details on how to submit comments are provided in the ''Public Participation'' section of this notice.

This notice is being sent to affected landowners; federal, state, and local government representatives and agencies; elected officials; Native American tribes; other interested parties; and local libraries and newspapers. State and local government representatives are asked to notify their constituents of this proposed project and to encourage them to comment on their areas of concern.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' addresses a number of typically asked questions and how to participate in the Commission's proceedings. It is available for viewing on the FERC Internet Web site (*http://www.ferc.gov*).

Summary of the Proposed Project

The six pipeline segments Southern proposes to abandon are located in Sharkey, Yazoo, Winston, Noxubee, and Lowndes Counties, Mississippi and Pickens and Tuscaloosa Counties, Alabama. These pipeline segments were installed using a mechanical coupling technology in the late 1930s and early 1940s. The pipeline, consisting of 18- to 24-inch-diameter pipe, would be cut, cleaned, sealed, and abandoned in place. In addition, three compressor units are proposed for abandonment at the Onward Compressor Station in Sharkey County. The project also includes the removal, installation, and modification of various ancillary facilities associated with the pipeline segments to be abandoned. Along the pipeline right-of-way, 46 work sites would be utilized for the abandonment and additional modifications.

All pipeline abandonment activities would be conducted within the existing right-of-way and compressor station areas. No new access roads would be required to facilitate the abandonment of the pipeline, compressor units, or ancillary facilities.

A map showing the general location of the proposed project is included as appendix 1.[1]

The EA Process

We[2] are preparing this EA to comply with the National Environmental Policy Act (NEPA) which requires the Commission to take into account the environmental impact that could result if it authorizes Southern's proposal. By this notice, we are also asking federal, state, and local agencies with jurisdiction and/or special expertise with respect to environmental issues to formally cooperate with us in the preparation of the EA. Agencies that would like to request cooperating status should follow the instructions for filing comments provided below.

NEPA also requires the FERC to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this Notice, we are requesting public comments on the scope of the issues to be addressed in the EA. All comments received will be considered during the preparation of the EA.

Our independent analysis of the issues will be presented in the EA. Depending on the comments received during the scoping process, the EA may be published and mailed to federal, state, and local agencies, public interest groups, interested individuals, affected landowners, local libraries and newspapers, and the Commission's official service list for this proceeding. A comment period will be allotted for review if the EA is published. We will consider all comments on the EA before we make our recommendations to the Commission.

[1] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of all appendices are available on the Commission's Web site at the ''eLibrary'' link or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or by calling (202) 502–8371. For instructions on connecting to eLibrary, refer to the ''Additional Information'' section of this notice. Copies of the appendices were sent to all those receiving this notice in the mail. Requests for detailed maps of the proposed facilities should be made directly to Southern.

[2] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the FERC's Office of Energy Projects.

To ensure your comments are received and considered, please carefully follow the instructions in the ''Public Participation'' section below.

Public Participation

You can make a difference by providing us with your specific comments or concerns about Southern's 2008 Abandonment and Replacement Project. Your comments should focus on the potential environmental effects of the proposal, reasonable alternatives, and measures to avoid or lessen the environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send in your comments so that they will be received in Washington, DC on or before January 30, 2009.

For your convenience, there are three methods which you can use to submit your comments to the Commission. In all instances please reference the project docket number with your submission. The docket number can be found on the front of this notice. The Commission encourages electronic filing of comments and has dedicated eFiling expert staff available to assist you at (202) 502–8258 or *eFiling@ferc.gov*.

(1) You may file your comments electronically by using the *Quick Comment* feature, which is located on the Commission's Internet Web site at *http://www.ferc.gov* under the link to *Documents and Filings*. A Quick Comment is an easy method for interested persons to submit text-only comments on a project.

(2) You may file your comments electronically by using the *eFiling* feature, which is located on the Commission's Internet Web site at *http://www.ferc.gov* under the link to *Documents and Filings*. eFiling involves preparing your submission in the same manner as you would if filing on paper, and then saving the file on your computer's hard drive. You will attach that file as your submission. New eFiling users must first create an account by clicking on ''*Sign up*'' or ''*eRegister*.'' You will be asked to select the type of filing you are making. A comment on a particular project is considered a ''Comment on a Filing.''

(3) You may file your comments via mail by sending an original and two copies of your letter to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1A, Washington, DC 20426.

Label one copy of the comments for the attention of Gas Branch 1, PJ–11.1.

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an official party to the proceeding known as an ''intervenor.'' Intervenors play a more formal role in the process. Among other things, intervenors have the right to receive copies of case-related Commission documents and filings by other intervenors. Likewise, each intervenor must send one electronic copy (using the Commission's eFiling system) or 14 paper copies of its filings to the Secretary of the Commission and must send a copy of its filings to all other parties on the Commission's service list for this proceeding.

If you want to become an intervenor, you must file a motion to intervene according to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214).[3] Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your environmental comments considered.

Environmental Mailing List

As described above, we may publish and distribute the EA for public review and comment. If you are interested in receiving an EA, please return the Environmental Mailing List Form (appendix 2). *If you do not return the Environmental Mailing List Form or comment on the project, you will be taken off the mailing list.* All individuals who provide comments will remain on our environmental mailing list for this project.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at 1–866–208–FERC or on the FERC Internet Website (*http://www.ferc.gov*) using the ''eLibrary'' link. Click on the eLibrary link, then on ''General Search'' and enter the docket number excluding the last three digits (*i.e.*, CP09–27) in the Docket Number field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm*.

Finally, any public meetings or site visits scheduled for this project will be posted on the Commission's calendar at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information. You can also request additional information by calling Southern at (205) 325–7696.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–50 Filed 1–6–09; 8:45 am]

BILLING CODE 6717–01–P

[3] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL09–25–000]

City of Anaheim, CA; Notice of Filing

December 30, 2008.

Take notice that on December 19, 2008, the City of Anaheim, California filed its sixth annual revision to its Transmission Revenue Balancing Account Adjustment, to become effective as of January 1, 2009.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies

of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on January 21, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–31430 Filed 1–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP09–43–000]

Heavenly Valley, L.P.; Notice of Filing

December 30, 2008.

Take notice that on December 22, 2008, Heavenly Valley, L.P. (Heavenly Valley) filed an application, pursuant to Section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's Rules and Regulations, to request certificates of public convenience and necessity authorizing Heavenly Valley to construct, own, and operate a natural gas pipeline in Eldorado County, California and Douglas County, Nevada (Powderbowl Pipeline); and to continue operating an existing 4,500 feet pipeline system at Heavenly Mountain. The application is on file with the Commission and open for public inspection. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

The Powderbowl Pipeline is a 1.86-mile, 4-inch diameter natural gas pipeline that will begin at Southwest Gas Corporation's existing above-ground meter station interconnection on the Nevada side and be terminated at the to-be-constructed Powderbowl Lodge on the California side. The Powderbowl Pipeline will be constructed entirely in Heavenly Valley's property. Heavenly Valley also seeks authorization to continue operating the existing 4,500-feet pipeline which was constructed by Heavenly Valley's predecessor in 2000 and has been operated by Heavenly Valley. The 4,500-feet pipeline is also confined in Heavenly Valley's property. These facilities will provide gas for heating and cooking at the Powderbowl Lodge. Heavenly Valley plans to complete construction of the proposed facilities by October 15, 2009.

Any questions regarding the application are to be directed to Andrew Strain, Vice President of Planning and Government Affairs, Heavenly Mountain Resort, P. O. Box 2180, Stateline, NV 89449, phone (775) 586–2313.

Any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the below listed comment date, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

Motions to intervene, protests and comments may be filed electronically via the Internet in lieu of paper, see, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Comment Date: January 21, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–31429 Filed 1–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL09–26–000]

New York State Electric & Gas Corporation; Notice of Filing

December 30, 2008.

Take notice that on December 23, 2008, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure, 18 CFR 385.207, New York State Electric & Gas Corporation (NYSEG) filed a petition for declaratory order, requesting the Commission to require New York Independent System Operator, Inc. (NYISO) to rebill certain charges, resulting from metering errors, dated back from inception of the NYISO in 1999, to correct incorrect invoices to NYSEG for purchases of energy totaling approximately $20 million.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on January 22, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–31432 Filed 1–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP08–436–000]

Stingray Pipeline Company, L.L.C.; Notice of Informal Settlement Conference

December 31, 2008.

Take notice that an informal settlement conference will be convened in this proceeding commencing at 10 a.m. on Thursday, January 8, 2009, at the offices of the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426 for the purpose of exploring the possible settlement of the above-referenced dockets.

Any party, as defined by 18 CFR 385.102(c), or any participant as defined by 18 CFR 385.102(b), is invited to attend. Persons wishing to become a party must move to intervene and receive intervenor status pursuant to the Commission's regulations (18 CFR 385.214).

FERC conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an e-mail to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or (202) 208–8659 (TTY), or send a FAX to (202) 208–2106 with the required accommodations.

For additional information, please contact Marc Gary Denkinger, (202) 502–8662, *marc.denkinger@ferc.gov* or Lorna Hadlock, (202) 502–8737 *lorna.hadlock@ferc.gov*.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–49 Filed 1–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP08–96–001]

Arlington Storage Company, LLC; Notice of Motion and Request for Shortened Response Time

December 31, 2008.

Take notice that on December 30, 2008, Arlington Storage Company, LLC (ASC), Two Brush Creek Boulevard, Kansas City, Missouri 64112, filed a motion to withdraw its Exhibit I, which contained executed precedent agreements, submitted on May 19, 2008 with its application in CP08–96–000. Alternatively, in the event withdrawal of the filing of Exhibit I is not practicable, ASC requests rehearing of Ordering Paragraph (E) of the Commission's December 18 Order [1], all as more fully set forth in the application which is on file with the Commission and open for public inspection. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

ASC avers that the filing of such precedent agreements was not material to the Commission's approval of the Project, pursuant to section 7(c) of the Natural Gas Act. If the withdrawal is not practicable, ASC, on rehearing, asks that the condition in Ordering Paragraph (E) requiring execution of firm service agreements prior to the start of construction be rescinded. Additionally, ASC requests a shortened response period, and that the Commission act no later than January 16th, 2009 on its motion or request for rehearing.

Any questions regarding the application are to be directed to William R. Moler, Senior Vice President, Midstream Operations, Arlington Storage Company, Two Brush Creek Boulevard, Kansas City, Missouri 64112; phone number (816) 329–5344 or by e-mail at *bmoler@inergyservices.com*.

[1] *Arlington Storage Company, LLC*, 125 FERC ¶ 61,306 (2008).

Comment Date: January 8, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–51 Filed 1–6–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Construction and Operation of the Proposed Transmission Agency of Northern California Transmission Project, California

AGENCY: Western Area Power Administration, DOE.

ACTION: Advance Notice of Intent to Prepare an Environmental Impact Statement/Environmental Impact Report; Notice of Floodplain and Wetlands Involvement.

SUMMARY: The Western Area Power Administration (Western), an agency of the U.S. Department of Energy (DOE), intends to prepare a joint environmental impact statement/environmental impact report (EIS/EIR) for the construction and operation of the proposed Transmission Agency of Northern California (TANC) Transmission Project (Project) in California. Western is issuing this Advance Notice to inform the public and interested parties early about the proposed Project. At a later date, Western plans to issue a formal Notice of Intent (NOI) and conduct a public scoping process, during which Western will invite the public to comment on the scope, proposed action, alternatives, and other issues to be addressed in the EIS/EIR.

The EIS/EIR will address the construction, maintenance, and operation of the proposed Project, which would include building and upgrading over 500 miles of 230-kilovolt (kV) and 500-kV transmission lines and associated equipment and facilities in northern California. Portions of the proposed Project may affect floodplains and wetlands in the area. Western will hold public scoping meetings in several locations near the Project area during the public scoping period, anticipated to begin in early 2009. At the scoping meetings, Western will share information and receive comments and suggestions on the scope of the EIS/EIR.

FOR FURTHER INFORMATION CONTACT: For further information about the project or the EIS/EIR process, contact Mr. David Young, National Environmental Policy Act (NEPA) Document Manager, Western Area Power Administration, Sierra Nevada Region, 114 Parkshore Drive, Folsom, CA 95630, telephone

(916) 353–4542, fax (916) 353–4772. For general information on DOE's NEPA review procedures or status of a NEPA review, contact Ms. Carol M. Borgstrom, Director of NEPA Policy and Compliance, GC–20, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, telephone (202) 586–4600 or (800) 472–2756.

SUPPLEMENTARY INFORMATION: Western, an agency within DOE, markets Federal hydroelectric power to preference customers, as specified by law. These customers include municipalities, cooperatives, irrigation districts, Federal and State agencies, and Native American tribes in 15 western states, including California. Western owns and operates more than 17,000 miles of high-voltage transmission lines.

TANC is a registered Transmission Owner, Transmission Planner, and Transmission Service Provider (as these terms are defined by the North American Electric Reliability Corporation). TANC's mission is to assist its publicly owned utility members in providing cost-effective energy supplies to their customers, through long-term ownership of high-voltage transmission lines within California and the western United States. TANC's membership includes the California cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara, and Ukiah; the Sacramento Municipal Utility District (SMUD); Modesto Irrigation District; and Turlock Irrigation District. The Plumas-Sierra Rural Electric Cooperative is an associate member of TANC. TANC owns and operates several transmission lines and associated facilities throughout Northern California.

Project Description

TANC and Western propose to coordinate development of the proposed Project, which includes new and upgraded 230-kV and 500-kV transmission lines, substations, and related facilities. The Project would be designed to provide new access to renewable energy resources in northern California, northwestern Nevada, and the Pacific Northwest, enhance the California-Oregon interties, reduce existing congestion and system losses, increase the load-carrying capability and reliability of northern California's transmission system, improve the reliability of Western's existing Balancing Authority Area, and relieve existing electrical transmission system constraints in northern California.

Details and plans for the proposed Project and alternatives are still being developed. Known components of the proposed Project would consist of five routing segments of transmission lines that generally extend from northeastern California to the Central Valley and westward into the San Francisco Bay Area. Alternatives to the proposed routes are currently in development.

North Segment. This segment would originate near the community of Ravendale in the Mt. Lassen area. It would be generally aligned to the southwest and terminate just south of the City of Redding at the California Oregon Transmission Project's (COTP) Olinda Substation. This segment would provide access to new and existing renewable energy resources. The North Segment would include new 500-kV transmission lines with up to three new substations.

Central Segment. The Central Segment would begin at the northern portion of the Central Valley, south of Redding and continue south to an area near Western's existing Tracy Substation. As a continuation of the North Segment, the Central Segment would include a new 500-kV transmission line extending from the Olinda Substation to two new substations, one in the southwestern section of SMUD's service territory, and a second near the Tracy Substation.

East Segment. This segment would begin at the proposed new substation near Tracy and be generally aligned in an easterly direction within the Central Valley to a new substation near the City of Oakdale and then would extend in a southerly direction to a new substation near the City of Turlock. The East Segment would include new 230-kV and 500-kV transmission lines and two new substations. It would provide an east-side tie between TANC members and the Central Segment.

West Segment. The West Segment would travel in a southwesterly direction from the COTP at the Tracy Substation and terminate in the City of Santa Clara, which is located in the southern portion of the San Francisco Bay area. This alignment would include new and upgraded 230-kV transmission lines and a new substation to provide a direct connection between the COTP and the City of Santa Clara.

Sierra Foothills Segment. This Segment would be built, owned, and operated by Western. It would originate at Western's existing New Melones Substation in the southern Sierra foothills near the City of Sonora and be aligned in a southwesterly direction to the proposed new substation on the East Segment, near the City of Oakdale. This Segment would include new 230-kV transmission lines.

To participate in the Project, Western must comply with NEPA (42 U.S.C. 4321–4347, as amended), Council on Environmental Quality Regulations for implementing NEPA (40 CFR parts 1500–1508), and DOE NEPA Implementing Procedures (10 CFR part 1021). Because the proposed Project may involve action in floodplains or wetlands, the EIS/EIR will include, as applicable, a floodplain/wetland assessment and floodplain/wetland statement of findings following DOE regulations for compliance with floodplain and wetlands environmental review (10 CFR part 1022).

Western is issuing this Advance Notice pursuant to 10 CFR 1021.311(b) to inform the public and interested parties early about the proposed Project. At a later date, Western intends to issue a formal NOI and conduct a public scoping process, during which Western will invite the public to comment on the scope, proposed action, alternatives and other issues to be addressed in the EIS/EIR. Additional detailed information on the components of the proposed Project, alternatives, and potential environmental issues will be more fully developed in the formal NOI.

Agency Responsibilities

Western is the lead Federal agency, as defined at 40 CFR 1501.5, for preparation of the NEPA analysis. The U.S. Department of the Agriculture, Forest Service and the U.S. Department of the Interior, Bureau of Land Management plan to be cooperating agencies because of their jurisdiction over proposed routing across public lands. With this notice, Tribes and agencies with jurisdiction or special expertise are also invited to be cooperating agencies. Such Tribes or agencies may make a request to Western to be a cooperating agency by contacting Mr. Young at the address listed above. Designated cooperating agencies have certain responsibilities to support the NEPA process, as specified at 40 CFR 1501.6(b).

TANC will be responsible for satisfying all requirements of the California Environmental Quality Act. Thus, Western and TANC will prepare a joint EIS/EIR.

Public Participation

Public participation and full disclosure are planned for the entire EIS/EIR process. The formal NOI is anticipated for publication in the **Federal Register** in early 2009. Once the NOI is published, TANC and Western will hold public scoping meetings. The dates, times, and locations, as well as information on how to provide

comments will be further described in the NOI. The EIS/EIR process will also include public review and hearings on the draft EIS/EIR; publication of a final EIS/EIR; and publication of a record of decision anticipated in early 2011.

Dated: December 22, 2008.

Timothy J. Meeks,

Administrator.

[FR Doc. E9–53 Filed 1–6–09; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0933; FRL–8398–7]

Issuance of an Experimental Use Permit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted an experimental use permit (EUP) (524-EUP-99) to the pesticide applicant--Monsanto Company. An EUP permits use of a pesticide for experimental or research purposes only in accordance with the limitations in the permit.

FOR FURTHER INFORMATION CONTACT: Mike Mendelsohn, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308-8715; e-mail address: Mike *Mendelsohn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. Although this action may be of particular interest to those persons who conduct or sponsor research on pesticides, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the information in this action, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0933. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr.*

II. EUP

EPA has issued the following EUP:

524-EUP-99—Issuance. Monsanto Company, 800 N. Lindbergh Blvd St. Louis, MO 63167. This EUP allows the use of the plant-incorporated protectants:

1. *Bacillus thuringiensis* Cry1A.105 protein and the genetic material necessary for its production (vector PV-ZMIR245) in event MON 89034 corn,

2. *Bacillus thuringiensis* Cry2Ab2 protein and the genetic material necessary for its production (vector PV-ZMIR245) in event MON 89034 corn,

3. *Bacillus thuringiensis* Cry3Bb1 protein and the genetic material necessary for its production (vector ZMIR39) in event MON 88017 corn (Organization for Economic Cooperation Development (OECD) Unique Identifier: MON-88017-3),

4. *Bacillus thuringiensis* Cry1F protein and the genetic material necessary for its production (plasmid insert PHI 8999) in corn (TC1507),

5. *Bacillus thuringiensis* Cry34Ab1 and Cry 35Ab1 proteins and the genetic material necessary for their production (plasmid insert PHP 17662) in event DAS-59122-7 corn.

These plant-incorporated protectants will be planted in the following combinations:

- MON 89034,
- MON 89034 x MON 88017,
- MON 89034 x TC1507,
- MON 89034 x DAS-59122-7,
- MON 89034 x MON 88017 x TC1507,
- MON 89034 x TC1507 x DAS-59122-7,
- MON 89034 x MON 88017 x DAS-59122-7,
- MON 88017 x TC1507 x DAS-59122-7,
- MON 88017,
- TC1507,
- DAS-59122-7,
- TC1507 x DAS-59122-7, and
- MON 89034 x MON 88017 x TC1507 x DAS-59122-7.

The quantity authorized equates to 73,080 lbs of corn seed (4.385 lbs active ingredients) on 4993 acres. This program is authorized to take place in the states of Alabama, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New York, North Carolina, Ohio, Oregon, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Texas, Washington, and Wisconsin. This EUP is effective from July 17, 2008, through June 30, 2009, and allows the protocols of breeding and observation, inbred seed increase and sample hybrid production, line per se, hybrid yield and herbicide tolerance trials, insect efficacy, product characterization and performance trials, insect resistance management trials, benefit trials, and seed treatment trials.

Two comments were submitted in response to the notice of receipt for this permit application which was published in the **Federal Register** on April 16, 2008 (73 FR 20625) (FRL–8357–8). Both comments were submitted by one individual who objected to issuance of an EUP. Comments expressed concern over Monsanto's credibility, unspecified environmental and human health effects, as well as the Agency's methodology in granting EUPs. The Agency understands the commenter's concerns and recognizes that some individuals believe that genetically modified crops and food should be banned completely. However, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the Agency is tasked with reviewing applications for EUPs and granting such applications to the extent that the conditions of FIFRA section 5, and the regulations thereunder, have been met (subject to such terms and conditions as the Agency determines are warranted). In this instance, EPA has determined that the relevant statutory and regulatory conditions have been met. Furthermore, EPA has concluded that there is a reasonable certainty that no harm will result from dietary exposure to these proteins as expressed in corn. Further, the Agency has concluded that no adverse environmental effects will be expected from their expression in corn via the subject testing which is of limited scope and duration.

III. What is the Agency's Authority for Taking this Action?

The Agency's authority for taking this action is 7 U.S.C. 136c.

List of Subjects

Environmental protection, Experimental use permits.

Dated: December 29, 2008.

W. Michael McDavit,

Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E8–31409 Filed 1–6–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0135; FRL–8397–5]

Pesticide Experimental Use Permit; Receipt of Application Amendment; Comment Request

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's receipt of an application 524–EUP–99 from Monsanto Company requesting an amendment to the experimental use permit (EUP) for the plant-incorporated protectants: 1) *Bacillus thuringiensis* Cry1A.105 protein and the genetic material necessary for its production (vector PV–ZMIR245) in event MON 89034 corn, 2) *Bacillus thuringiensis* Cry2Ab2 protein and the genetic material necessary for its production (vector PV–ZMIR245) in event MON 89034 corn, 3) *Bacillus thuringiensis* Cry3Bb1 protein and the genetic material necessary for its production (vector ZMIR39) in Event MON 88017 corn (Organization for Economic Cooperation and Development (OECD) Unique Identifier: MON–88017–3), 4) *Bacillus thuringiensis* subspecies Cry1F protein and the genetic material necessary for its production (vector PHI 8999) in corn, and 5) *Bacillus thuringiensis* Cry34Ab1 and Cry35Ab1 proteins and the genetic material necessary for their production (vector PHP 17662) in Event DAS–59122–7 corn. The Agency has determined that the permit may be of regional and national significance. Therefore, in accordance with 40 CFR 172.11(a), the Agency is soliciting comments on this application.

DATES: Comments must be received on or before February 6, 2009.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2008–0135, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington,VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2008–0135. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Susanne Cerrelli, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8077; e-mail address: *cerrelli.susanne@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to those persons interested in agricultural biotechnology or those who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA) or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice*. EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide(s) discussed in this document, compared to the general population.

II. What Action is the Agency Taking?

Under section 5 of FIFRA, 7 U.S.C. 136c, EPA can allow manufacturers to field test pesticides under development. Manufacturers are required to obtain an EUP before testing new pesticides or new uses of pesticides if they conduct experimental field tests on 10 acres or more of land or one acre or more of water.

Pursuant to 40 CFR 172.11(a), the Agency has determined that the following EUP amendment application may be of regional and national significance, and therefore is seeking public comment on the EUP amendment application:

Submitter: Monsanto Company, (524–EUP–99).

Plant-incorporated Protectants: 1) *Bacillus thuringiensis* Cry1A.105 protein and the genetic material necessary for its production (vector PV–ZMIR245) in event MON 89034 corn, 2) *Bacillus thuringiensis* Cry2Ab2 protein and the genetic material necessary for its production (vector PV–ZMIR245) in event MON 89034 corn, 3) *Bacillus thuringiensis* Cry3Bb1 protein and the genetic material necessary for its production (vector ZMIR39) in Event MON 88017 corn (OECD Unique Identifier: MON–88017–3), 4) *Bacillus thuringiensis* subspecies Cry1F protein and the genetic material necessary for its production (vector PHI 8999) in corn, and 5) *Bacillus thuringiensis* Cry34Ab1 and Cry35Ab1 proteins and the genetic material necessary for their production (vector PHP 17662) in Event DAS–59122–7 corn.

Summary of Request: On July 17, 2008, EPA approved Monsanto Company's application for an EUP for the testing of the combined trait corn product MON 89034 (Cry1A.105 and Cry2Ab2) x TC1507 (Cry1F) x MON 88017 (Cry3Bb1) x DAS–59122–7 (Cry34Ab1 and Cry35Ab1) as well as other event sub-combinations through June 30, 2009, appears elsewhere in this issue of the **Federal Register**. Monsanto proposes amending the EUP application to allow testing on a maximum 17,777.42 total program acres with a proposed planting season from February 15, 2009 through June 13, 2010. This acreage includes 3,736.72 acres of combined trait product, MON 89034 x TC1507 x MON 88017 x DAS–59122–7; 4,906.85 acres of other event sub-combinations; 5,257.82 acres of other corn containing registered plant-incorporated protectants to be used as comparators in these trials; and 3,876.03 acres of non-plant-incorporated protectant corn acres and border rows.

Trial protocols to be conducted include:

- Breeding and observation nursery.
- Inbred seed increase and sample hybrid production.
- Line *per se*, hybrid yield and herbicide tolerance.
- Insect efficacy.
- Product characterization and performance.
- Insect resistant management.
- Benefits trials.
- Seed treatment.

States and territories involved include: Alabama, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Puerto Rico, South Carolina, South Dakota, Tennessee, Texas, Washington, and Wisconsin.

A copy of the amendment application and any information submitted is available for public review in the docket established for this EUP amendment application as described under **ADDRESSES**.

Following the review of the amendment application and any comments and data received in response to this solicitation, EPA will decide whether to issue or deny the EUP request, and if issued, the conditions under which it is to be conducted. Any issuance of an EUP will be announced in the **Federal Register**.

List of Subjects

Environmental protection, Experimental use permits.

Dated: December 29, 2008.

W. Michael McDavit,

Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E8–31410 Filed 1–7–08; 8:45 am]

BILLING CODE 6560–50–S

FARM CREDIT ADMINISTRATION

Farm Credit Administration Board; Regular Meeting

AGENCY: Farm Credit Administration.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), of the regular meeting of the Farm Credit Administration Board (Board).

DATE AND TIME: The regular meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on January 8, 2009, from 9 a.m. until such time as the Board concludes its business.

FOR FURTHER INFORMATION CONTACT: Roland E. Smith, Secretary to the Farm Credit Administration Board, (703) 883–4009, TTY (703) 883–4056.

ADDRESSES: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090.

SUPPLEMENTARY INFORMATION: Parts of this meeting of the Board will be open to the public (limited space available), and parts will be closed to the public. In order to increase the accessibility to Board meetings, persons requiring assistance should make arrangements in advance. The matters to be considered at the meeting are:

Open Session

A. *Approval of Minutes*

- December 11, 2008

B. *New Business*

- Auditors' Report on FCA FY 2008/ 2007 Financial Statements
- Registration of Loan Originators Under the Secure and Fair Enforcement for Mortgage Licensing Act of 2008

C. *Reports*

- OE Quarterly Report

Closed Session *

- Update on OE Oversight Activities

Dated: January 5, 2009.

Roland E. Smith,

Secretary, Farm Credit Administration Board.

[FR Doc. E9–121 Filed 1–5–09; 4:15 pm]

BILLING CODE 6705–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notices

AGENCY: Federal Election Commission.

DATE AND TIME: Thursday, January 8, 2009, at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC (Ninth Floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Correction and Approval of Minutes.

Management and Administrative Matters.

Individuals who plan to attend and require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Mary Dove, Commission Secretary, at (202) 694–1040, at least 72 hours prior to the hearing date.

DATE AND TIME: Friday, January 9, 2009, at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. 437g.

Audits conducted pursuant to 2 U.S.C. 437g, § 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

* Session Closed—Exempt pursuant to 5 U.S.C. 552b(c)(8) and (9).

PERSON TO CONTACT FOR INFORMATION: Robert Biersack, Press Officer, Telephone: (202) 694–1220.

Darlene Harris,

Deputy Secretary of the Commission.

[FR Doc. E8–31465 Filed 1–6–09; 8:45 am]

BILLING CODE 6715–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice Regarding Revisions to the Laboratory Protocol To Measure the Quantity of Nicotine Contained in Smokeless Tobacco Products Manufactured, Imported, or Packaged in the United States

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services.

ACTION: Notice and Summary of Public Comments.

SUMMARY: This notice amends the uniform protocol for the analysis of nicotine, total moisture, and pH in smokeless tobacco products (''Protocol''). The Protocol, originally published in the **Federal Register** in 1999 (64 FR 14086) and revised in the **Federal Register** on March 14, 2008 (73 FR 13903), implements the requirement of the Comprehensive Smokeless Tobacco Health Education Act (CSTHEA) of 1986 (15 U.S.C. 4401 *et seq.,* Pub. L. 99–252) that each person manufacturing, packaging, or importing smokeless tobacco products shall annually provide the Secretary of Health and Human Services (HHS) with a specification of the quantity of nicotine contained in each smokeless tobacco product. CDC re-published the notice in the **Federal Register** on June 23, 2008 (73 FR 35395) concerning the revision of the Protocol (1) To make a technical change to correct the date when the first report of information under the revised Protocol is due and (2) to solicit public comments concerning a change in the Protocol that increased the volume of water in the pH determination from 10 mL to 20 mL, and (3) to solicit public comments concerning the addition of the following commercial smokeless tobacco product categories: dry snuff portion packs, snus, snus portion packs, and pellet or compressed. This Notice also includes a summary of public comments and CDC's response to them.

The Protocol as published in the **Federal Register** on March 14, 2008 (73 FR 13903), remains in effect with the technical correction to the date as described in the **Federal Register** notice published on June 23, 2008 (73 FR 35395).

DATES: First report of information due June 30, 2009, with subsequent submissions due by March 31 of each year.

FOR FURTHER INFORMATION, CONTACT: Matthew McKenna, M.D., Director, Office on Smoking and Health, Centers for Disease Control and Prevention, *Telephone:* (770) 488–5701.

SUPPLEMENTARY INFORMATION: Since the implementation of the Protocol in 1999, several smokeless tobacco product categories have entered the U.S. smokeless tobacco market including snus, low moisture snuff sold in portion pouches, and smokeless tobacco sold in a compressed, pellet form. Some of the new smokeless tobacco product categories differ physically from previous smokeless tobacco categories, prompting a revision to the Protocol to reflect the current state of the marketplace.

Through its review of the Protocol, CDC also determined that an increase in volume of deionized, distilled water would facilitate measurements of pH values. After evaluating information that was brought to the attention of CDC regarding low moisture smokeless tobacco products packaged in portion pouches, CDC conducted an independent comparison of pH measurements in a wide variety of low and high moisture smokeless tobacco products. The results of the comparison indicated an acceptable (less than 2%) level of change in pH values when measurements were taken with 20 mL deionized, distilled water compared to the volume of deionized, distilled water specified in the previous Protocol. Increasing the volume of water in the mixture ensured that the matrix was sufficiently fluid to facilitate ease of measure. Thus, it is anticipated that the change in the volume of liquid for pH determination will facilitate the ease of measure of smokeless tobacco pH for all currently marketed smokeless tobacco categories (i.e., plug, twist, moist snuff, dry snuff, snus, loose leaf, chew, moist snuff in portion pouches, smokeless tobacco compressed into a pellet, and dry snuff in portion pouches).

Summary of Public Comments and CDC's Response: On June 23, 2008, a notice (73 FR 35395) was published reflecting the above discussed revisions to the Protocol and to solicit public comment on these specific changes. Six comments were received by the CDC, a majority of which suggested alternative approaches. A summary of the

comments received and CDC's response follows.

One commenter expressed a concern for the Federal funding and overall direction of the ''smokeless tobacco program.''

The issues raised in this comment were beyond the scope of the Protocol and solicitation of public comment.

One commenter, on behalf of several smokeless tobacco manufacturers, agreed with the proposed revision of Section IV(B) (see below for Protocol) of the Protocol to increase the volume of deionized, distilled water to be used in pH measurements from 10mL to 20mL.

One commenter, on behalf of several smokeless tobacco manufacturers, suggested that ''some flexibility be incorporated into Section IV(B) of the Protocol by providing that, as long as a minimum of 20 mL of liquid and 2 grams of sample are utilized, then larger amounts of liquid and sample may be utilized provided they are in a 10 to 1 ratio.''

CDC appreciated the suggestion that there be flexibility in adjusting the quantity of liquid and sample so long as the ratio of liquid to sample is 10 to 1. In evaluating this suggestion, CDC determined that adopting such a change would deviate from principles of good scientific practice as it does not promote protocol consistency, contrary to the aims of a uniform analytical protocol. According to the Cooperative Centre for Scientific Research Relative to Tobacco (CORESTA), a central organization responsible for promoting tobacco-related cooperative research, ''[t]he development of standard methods is critically important in ensuring consistency and comparability of data reported by the association members and as part of regulatory reporting of data.'' [Further details on CORESTA's viewpoint and its objectives are available online at *http://www.coresta.org/Home_Page/PresentationCORESTA(Oct08).pdf.*] As the fundamental purpose of the Protocol is to implement a multi-site testing protocol, CDC concluded that the development of a uniform analytical protocol is paramount to ensuring sound scientific efforts.

One commenter, on behalf of several smokeless tobacco manufacturers, raised the following point regarding the categorization of smokeless tobacco products in Section I(F) of the Protocol:

> ''* * * many of these separate product 'categories' are essentially identical smokeless tobacco products for the purposes of sample preparation (e.g., Moist snuff and snus; Moist snuff portion packs and snus portion packs) * * * since a number of smokeless tobacco manufacturers have stated that they are developing new or 'innovative' smokeless tobacco products, an approach that creates a new 'category' and sample preparation instruction every time a smokeless tobacco product is introduced with a different name or description will result in a proliferation of smokeless tobacco product 'categories' and a need to constantly revise the Protocol to add new sample preparation instructions. Such revisions would trigger a notice and comment process under the Administrative Procedure Act.''

CDC made the determination to include the four newly listed categories after having reviewed the number and types of smokeless tobacco products that had entered the market since 1999. In this review, CDC concluded that several new products would benefit from a separate categorization to not only better aid manufacturers in distinguishing their products in this protocol, but also reflect the variety of products being sold to and recognized by consumers. This review also determined that in the years since the implementation of the Protocol in 1999, the quantities of new products introduced to market requiring separate categorization had been fairly limited; thus, CDC did not believe that constant revisions to the Protocol would be necessary. However, CDC will continue to monitor the introduction of new smokeless tobacco products and provide assistance to reporting entities on the application of the Protocol as needed.

One commenter, on behalf of several smokeless tobacco manufacturers, suggested an alternative approach that would ''eliminate, or at the least minimize, the need for new 'categories' and sample preparation instructions.''

This alternative proposal suggested that:

> ''The alternative approach would be to define the smokeless tobacco product categories based on physical characteristics relevant to sample preparation (essentially tobacco particle size and whether tobacco particles are in a pouch), rather than on a manufacturer's package label statement or description * * * ''

Three product categories were thus proposed.

If any products did not fall into the three categories, the proposal suggested that:

> ''* * * in the event that a smokeless tobacco manufacturer or importer believes that a newly marketed smokeless tobacco product does not fit within any of the above categories, then samples should be prepared in a manner compatible with the above sample preparation instructions and the manufacturer or importer should describe the sample preparation procedures used when making its submissions to CDC.''

After an evaluation of this alternative approach, CDC concluded that the current method of categorization is more appropriate for several reasons. First, the current method has been in place since 1999, with no noted difficulties associated with this product categorization. Second, CDC noted that other Federal agencies, such as the Federal Trade Commission (FTC) and United States Department of Agriculture (USDA), receive and review information on smokeless tobacco, not on the basis of physical size characteristics, but on these commonly accepted types of categories. Examples can be found in the FTC's ''Federal Trade Commission Smokeless Tobacco Report for the Years 2002–2005,'' available online at *http://www.ftc.gov/reports/tobacco/02-05smokeless0623105.pdf,* or in the USDA Economic Research Service's ''Tobacco Situation and Outlook Yearbook'', available online at *http://usda.mannlib.cornell.edu/usda/ers/TBS-yearbook//2000s/2007/TBS-yearbook-01-12-2007.pdf/.*

Furthermore, CDC viewed the existing categorization of products by traditional ''consumer-oriented'' descriptions as useful in easily identifying issues that concern the general consumer and the overall public's health. In contrast, adopting a method of categorization based solely on physical product characteristics would not be beneficial towards that goal.

Finally, during its review of this alternate approach, CDC noted that there are only three existing methods to prepare smokeless tobacco products for analysis in this protocol, despite the varied physical characteristics of currently marketed smokeless tobacco products.

One commenter, on behalf of several smokeless tobacco manufacturers, suggested that ''the reporting provision of the FRN be amended to provide the following: (i) The revised Protocol shall take effect January 1, 2009, and (ii) the first report of information pursuant to the revised Protocol is due March 31, 2010, with subsequent submissions due by March 31 of each year. This amendment would afford smokeless tobacco manufacturers a reasonable amount of time to prepare for the implementation of the revised Protocol, and would continue the current practice of manufacturers submitting a full year of data based on a consistent methodology.''

For the purposes of this comment, CDC took into consideration a **Federal Register** Notice published in March 2008 (73 FR 13903), which served as public notice about the changes in the Protocol. CDC regarded this duration of notice as sufficient for the first report of information to be due June 30, 2009,

with subsequent submissions due by March 31 of each year, as laid out in the June 23, 2008 **Federal Register** (73 FR 35395).

Collection of Information

This proposed amendment does not call for any new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Dated: December 29, 2008.

James D. Seligman,

Chief Information Officer, Centers for Disease Control and Prevention.

Revised Protocol for Analysis of Nicotine, Total Moisture, and pH in Smokeless Tobacco Products

I. Requirements [1] [2]

A. Reagents [3]

1. Sodium hydroxide (NaOH), 2N
2. Methyl t-butyl ether (MTBE)
3. (−)-Nicotine (Fluka 72290) >99% purity [4] [5]
4. Quinoline (Aldrich)
5. Standard pH buffers; 4.01, 7.00, and 10.00
6. Deionized distilled water

B. Glassware and Supplies

1. Volumetric flasks, class A
2. Culture tubes, 25 mm x 200 mm, with Teflon-lined screw caps
3. Pasteur pipettes
4. Repipettors (10 mL and 50 mL)
5. Linear shaker (configured to hold tubes in horizontal position) [6] [7]
6. Weighing dishes, aluminum
7. Teflon-coated magnetic stirring bars
8. Polypropylene containers, 50 mL

C. Instrumentation

1. Robot Coupe Model RSI 2V Scientific Batch Processor
2. Capillary gas chromatograph, Hewlett Packard, Model 6890, with split/splitless injector capability, flame ionization detector, and a capillary column (Hewlett Packard HP–5, Crosslinked 5% PH ME Siloxane, 30 m length x 0.32 mm ID, film thickness 0.25 or 0.52 μm)
3. Orion Model EA 940 pH meter equipped with Orion 8103 Ross combination pH electrode

D. Additional Equipment

Forced-air oven, Fisher Isotemp®, regulated to 99 ± 1.0°C. Suggested dimensions: 18 x 18 x 20inches.

E. Chromatographic Conditions [8] [9]

1. Detector temperature: 250°C
2. Injector temperature: 250°C
3. Flow rate at 100°C—1.7 mL/min; with split ratio of 40:1 [10]
4. Injection volume: 2 μl
5. Column conditions: 110–185°C at 10°C min^{-1}; 185–240°C at 6°C min^{-1}, hold at final temperature for 10 min.

F. Sample Preparation [11]

There are ten different categories of commercial smokeless tobacco products:
1. Dry snuff;
2. Moist (wet) snuff;
3. Moist (wet) snuff portion packs;
4. Plug;
5. Twist;
6. Loose leaf;
7. Dry snuff portion packs;
8. Snus;
9. Snus portion packs; and
10. Pellet or Compressed.

Because of their physical characteristics, some of the ten product categories must be ground (whole or in part) before nicotine, total moisture, and pH analyses can be conducted. The objective of grinding the samples is to obtain a homogeneous sample with particles measuring approximately 4 mm. Grinding to achieve this particle size should take no more than 3 minutes. To ensure proper grinding and an adequate amount of the ground sample for analysis, the minimum sample size of all commercial products to be ground should not be less than 100 grams.

To ensure precision of analyses for nicotine, total moisture, and pH, the samples that require grinding should be ground using a Robot Coupe Model RSI 2V Scientific Batch Processor or its equivalent. This is a variable speed (0 to 3000 RPM) processor. The variable speed motor is required to ensure proper grinding of the tobacco tissues (and in the case of pH determination, the portion pack). Elevated temperatures can result in moisture loss and an underestimated value for moisture content. Hence, care must be taken during grinding to avoid elevated temperatures. The bowl should be cleaned after each grinding to obtain accurate results. Freeze- or cryo-grinding is also an acceptable grinding method.

1. *Dry snuff:* Dry snuff samples do not need to be ground since the product is a powder. The sample must be thoroughly mixed before weighing for nicotine, total moisture, and pH analysis.

2. *Moist (wet) snuff:* Moist (wet) snuff samples do not need to be ground. The sample must be thoroughly mixed before weighing for nicotine, total moisture, and pH analysis.

3. *Moist (wet) snuff portion packs:* The tobacco contents of the moist (wet) snuff portion packs do not need to be ground for nicotine, total moisture, or pH analysis. The tobacco packaging material (the ''pouch'') should be separated from the tobacco and ground to obtain particles measuring approximately 4 mm for pH analysis. The tobacco of the moist (wet) snuff portion pack and the ground pouch are combined and thoroughly mixed before pH analysis.

4. *Plug tobacco:* Break or cut apart plugs and add in portions to grinder at 2000 RPM. Reduce RPM or stop grinding if sample bowl becomes warm. Pulse the Robot Coupe, when needed, to complete grinding. Grind samples until approximately 4 mm in size. The total grinding time should be no more than 3 minutes.

5. *Twist tobacco:* Separate twists, add to grinder and grind at 2000 RPM. Reduce RPM or stop grinding if sample bowl becomes warm. Continue grinding until sample particles are approximately 4 mm in size. The total time for grinding should be no more than 3 minutes.

6. *Loose leaf:* Grind in the same manner as described in 4 and 5 to obtain product with particle size of approximately 4 mm.

7. *Dry snuff portion packs:* The tobacco contents of the dry snuff portion packs do not need to be ground for nicotine, total moisture, or pH analysis. The tobacco packaging material (the ''pouch'') should be separated from the tobacco and ground to obtain particles measuring approximately 4 mm for pH analysis. The tobacco of the dry snuff portion pack and the ground pouch are combined and thoroughly mixed before pH analysis.

8. *Snus:* Snus samples do not need to be ground since the product is a powder. The sample must be thoroughly mixed before weighing for nicotine, total moisture, and pH analysis.

9. *Snus portion packs:* The tobacco contents of the snus portion packs do not need to be ground for nicotine, total moisture, or pH analysis. The tobacco packaging material (the ''pouch'') should be separated from the tobacco and ground to obtain particles measuring approximately 4 mm for pH analysis. The tobacco of the snus portion pack and the ground pouch are combined and thoroughly mixed before pH analysis.

10. *Pellet or compressed:* Break apart compressed tobacco pellets and add in portions to grinder at 2000 RPM. Reduce RPM or stop grinding if sample bowl becomes warm. Pulse the Robot Coupe, when needed, to complete grinding. Grind samples until approximately 4 mm in size. The total grinding time should be no more than 3 minutes.

II. Nicotine Analysis [12]

A. Calibration Standards

1. Internal Standard (IS)

Weigh 10.00 grams of quinoline, transfer to a 250 mL volumetric flask and dilute to volume with MTBE. This solution will be used for calibration of the instrument for the nicotine calibration curve (II.A.2), for the standards addition assay (II.B), and for preparation of the extracting solution (II.D).

2. Nicotine Calibration Curve

a. Weigh 1.0000 gram of nicotine into a clean, dry 100 mL volumetric flask and dilute to volume with MTBE. This gives a nicotine concentration of 10 mg/mL for the stock solution.

b. Accurately pipette 0.5 mL of IS from stock solution (II.A.1) to five clean, dry 50 mL volumetric flasks. To prepare a nicotine standard corresponding to a concentration of 0.8 mg/mL, pipette exactly 4.0 mL of the nicotine standard (II.A.2.a) to a 50 mL volumetric flask containing the internal standard and dilute to volume with MTBE. To obtain nicotine concentrations equivalent to 0.6, 0.4, 0.2, and 0.1 mg/mL, pipette precisely 3.0, 2.0, 1.0, and 0.5 mL, respectively, of the nicotine standard into the four remaining flasks and dilute to volume with MTBE.

c. Transfer aliquots of the five standards to auto sampler vials and determine the detector response for each standard using gas chromatographic conditions described in I.E.

d. Calculate least squares line for linear equation from these standards by obtaining the ratio of $Area_{nicotine}$/ $Area_{IS}$. This ratio will be the Y value and the concentration of nicotine will be the X value for determining the linear equation of the line (Equation 1):

Equation 1:

$$Y = a + bX;$$

Where:
X = Concentration of nicotine in mg
Y = $Area_{nicotine}$/ $Area_{IS}$
a = intercept on the ordinate (y axis)
b = slope of the curve

The final result will be reported in the following units:

Concentration of nicotine = mg of nicotine/gram of tobacco sample.

e. Determine the recovery of nicotine by pipetting 10 mL of the 0.4 mg/mL nicotine standard to a screw capped tube containing 1.0 mL of 2 N NaOH. Cap the tube. Shake the contents vigorously and allow the phases to separate. Transfer an aliquot of the organic phase to an injection vial and inject. Calculate the concentration of nicotine using the equation of the line in II.A.2.d above. This should be repeated two more times to obtain an average of the three values. The recovery of nicotine can be obtained by using the following equation:

Equation 2:

$$Recovery = Nicotine_{calculated}/Nicotine_{actual}$$

B. Standards Addition Assay

Prior to analyzing a smokeless tobacco product for nicotine content, the testing facility must validate the system to verify that matrix bias is not occurring during nicotine extraction. This is done by analyzing the nicotine calibration standards in the same vegetable matrix as the smokeless tobacco. The first time each smokeless tobacco product is tested and whenever a change is made to the product formulation (including a change to the tobacco blend or cultivar), the Standards Addition Assay will be performed, and documentation of its performance and of the nicotine concentrations selected for the standard curve (II.B.2) will be submitted to the Centers for Disease Control and Prevention.

1. Using an analytical balance, accurately weigh 1.000 ± 0.020 gram of the homogeneous, prepared tobacco sample into a culture tube. Repeat this five times for a total of 6 culture tubes containing the smokeless tobacco product. Record the weight of each sample.

2. Prepare a five-point standard curve for the Standards Addition Assay. The standard curve must consist of nicotine concentrations that encompass the range of values expected from adding known concentrations of the nicotine standard (II.A.2.a) to a measured quantity of the smokeless tobacco product (1.000 ± 0.020 gram, described in II.B.1). The sixth culture tube is not supplemented with nicotine and serves as an analytical blank. Allow the samples to equilibrate for 10 minutes.

3. Pipette 5 mL of 2 N NaOH into each tube. Cap each tube. Swirl to wet sample and allow to stand 15 minutes.[13]

4. Pipette 50 mL of extraction solution (II.D.1) into each tube. Cap each tube and tighten.[14]

5. Place tubes in rack(s), place racks in linear shaker in horizontal position and shake for two hours.

6. Remove rack(s) from shaker and place in vertical position to allow the phases to separate.

7. Allow the solvent and nicotine supplemented samples and the blank to separate (maximum 2 hours).

8. Transfer aliquots of the five standards and the blank from the extraction tubes to sample vials and determine the detector response for each using gas chromatographic conditions described in I.E.

9. Subtract the $Area_{nicotine}/Area_{IS}$ of the blank from the $Area_{nicotine}/Area_{IS}$ of each of the standards.

10. Calculate least squares line for linear equation from the corrected standards as described above (Equation 1) in II.A.2.d. The final corrected result will be reported in the following units: Concentration of nicotine = mg of nicotine/gram of tobacco sample.

11. Determine the recovery of nicotine by pipetting 10 mL of the 0.4 mg/mL nicotine standard to a screw capped tube containing 1.0 mL of 2 N NaOH and 10 mL of extraction solution (II.D.1). Cap the tube and tighten. Shake the contents vigorously and allow the phases to separate. Transfer an aliquot of the organic phase to an injection vial and inject. Calculate the concentration of nicotine using the equation of the line above in II.A.2.d. This should be repeated two more times to obtain an average of the three values. The recovery of nicotine can be obtained by using Equation 2: Recovery = $Nicotine_{calculated}/Nicotine_{actual}$.

12. Compare the results of steps II.A.2 and II.B. If they differ by a factor of 10% or more, the recovery of nicotine from the aqueous matrix is not equivalent to recovery from the vegetable matrix of the smokeless tobacco product. In this instance, the nicotine concentration of the smokeless tobacco product must be determined from a nicotine calibration curve prepared from nicotine standards in a vegetable-based matrix.

C. Quality Control Pools

At least two quality control pools at the high and low ends of the expected nicotine values are recommended to be included in each analytical run. The pools should be analyzed in duplicate in every run. The quality control pools should be available in sufficient quantity to last for all analyses of a product.

D. Sample Extraction Procedure [12]

1. Extraction solution is prepared by pipetting 10 mL of the IS from the stock solution (II.A.1) to a 1000 mL volumetric flask and diluting to volume with MTBE.

2. Using an analytical balance, accurately weigh 1.000 ± 0.020 gram of prepared tobacco sample into culture tube and record weight.[15] Sample each smokeless tobacco brand name according to the provided testing frequency schedule.[19] The number of

products sampled should reflect an acceptable level of precision.[16] The test material is to be representative of the product that is sold to the public and therefore should consist of sealed, packaged samples of finished product that is ready for commercial distribution. Samples are to be analyzed in duplicate.

3. Pipette 5 mL of 2 N NaOH into the tube. Cap the tube. Swirl to wet sample and allow to stand 15 minutes.[13]

4. Pipette 50 mL of extraction solution into tube, cap tube and tighten.[14]

5. Place tubes in rack(s), place racks in linear shaker in horizontal position and shake for two hours.

6. Remove rack(s) from shaker and place in vertical position to allow the phases to separate.

7. Allow the solvent and sample to separate (maximum 2 hours). Transfer an aliquot from the extraction tube to a sample vial and cap.

8. Analyze the extract using GC conditions as described above (I.E) and calculate the concentration of nicotine using the linear calibration equation. Correct percent nicotine values for both recovery and weight of sample by using Equation 3.[17]

Equation 3:[18]

$$\text{Nicotine (mg/g)} = \frac{\left(\text{Area}_{\text{nicotine}}/\text{Area}_{\text{IS}}\right) - a}{b \times \text{Sample Wt} \times \text{Recovery}}$$

9. Report the final nicotine determination as mg of nicotine per gram of the tobacco product (mg nicotine/gram), to an accuracy level of two decimal places for each brand name (e.g., Skoal Bandits Wintergreen, Skoal Long Cut Cherry, Skoal Long Cut Wintergreen, etc.). All data should include the mean value with a 95% confidence interval, the range of values, the number of samples tested, the number of lots per brand name, and the estimated precision of the mean. Information will be reported for each manufacturer and variety (including brand families and brand variations) and brand name (e.g., Skoal Bandits Wintergreen, Skoal Long Cut Cherry, Skoal Long Cut Wintergreen, etc.).

III. Total Moisture Determination

A. This procedure is a modification of AOAC Method 966.02 (1990) and is referred to as ''Total Moisture Determination'' because it determines water and tobacco constituents that are volatile at temperatures of 99 ± 1.0°C.

B. Accurately weigh 5.00 grams of the sample (ground to pass ≤ 4 mm screen)[20] into a weighed moisture dish and place uncovered dish in oven.[21] Sample each smokeless tobacco brand name according to the provided testing frequency schedule.[19] The number of products sampled should reflect an acceptable level of precision.[16] The test material is to be representative of the product that is sold to the public and therefore should consist of sealed, packaged samples of finished product that is ready for commercial distribution. Samples are to be analyzed in duplicate.

C. Do not exceed 1 sample/10 sq in (650 sq cm) shelf space, and use only 1 shelf. Dry 3 hr at 99 ± 1.0°C. Remove from oven, cover, and cool in desiccator to room temperature (about 30 min). Reweigh and calculate percent moisture.

D. Report the final moisture determination as a percentage (%), to an accuracy level of one decimal place for each brand name (e.g., Skoal Bandits Wintergreen, Skoal Long Cut Cherry, Skoal Long Cut Wintergreen, etc.). All data should include the mean value with a 95% confidence interval, the range of values, the number of samples tested, the number of lots per brand name, and the estimated precision of the mean. Information will be reported for each manufacturer and variety (including brand families and brand variations) and brand name (e.g., Skoal Bandits Wintergreen, Skoal Long Cut Cherry, Skoal Long Cut Wintergreen, etc.).

IV. pH Measurement [12 22]

A. Test samples as soon as possible after they are received. Sample each smokeless tobacco brand name according to the provided testing frequency schedule.[19] The number of products sampled should reflect an acceptable level of precision.[16] The test material is to be representative of the product that is sold to the public and therefore should consist of sealed, packaged samples of finished product that is ready for commercial distribution. Samples are to be analyzed in duplicate.

B. Accurately weigh 2.00 grams of the sample. Place in a 50 mL polypropylene container with 20 mL deionized distilled water.

C. Place Teflon-coated magnetic stirring bar in container and stir mixture continuously throughout testing.

D. Measure pH of sample after a two-point calibration of the pH meter to an accuracy of two decimal places using standard pH buffers (4.01 and 7.00 or 7.00 and 10.00) that will encompass the expected pH value of the smokeless tobacco product.

E. The first time pH values are determined for a smokeless tobacco product, measure the pH of the smokeless tobacco product at 5, 15, and 30 minutes. If there is no systematic variation in pH values with time, all subsequent pH determinations are made at 5 minutes. If there is systematic variation in pH values, continue to measure the pH of the smokeless tobacco product until the pH value is stable and does not vary more than 10% over 15 minutes. Report the final pH value.

F. Report the final pH determination to an accuracy level of two decimal places for each brand name (e.g., Skoal Bandits Wintergreen, Skoal Long Cut Cherry, Skoal Long Cut Wintergreen, etc.). All data should include the mean value with a 95% confidence interval, the range of values, the number of samples tested, the number of lots per brand name, and the estimated precision of the mean. Information will be reported for each manufacturer and variety (including brand families and brand variations) and brand name (e.g., Skoal Bandits Wintergreen, Skoal Long Cut Cherry, Skoal Long Cut Wintergreen, etc.).

G. Estimate the un-ionized (free) nicotine content with the Henderson-Hassel Balch equation (Equation 4), based on measured pH and nicotine content.

Equation 4:

$$pH = pKa + \log\frac{[B]}{[BH^+]}$$

$$B + H^+ \rightleftharpoons BH^+$$

$$\%\ \text{un-ionized (free) nicotine} = \frac{\frac{[B]}{[BH^+]}}{\frac{[B]}{[BH^+]}+1}\times 100$$

pKa = 8.02 (CRC Handbook of Chemistry and Physics, 1989-1990)
[B] = amount of un-ionized (free) nicotine
$[BH^+]$ = amount of ionized nicotine

H. Report the final estimated un-ionized (free) nicotine as a percentage (%) of the total nicotine content, to an accuracy level of two decimal places and as mg of un-ionized (free) nicotine per gram of the tobacco product (mg un-ionized (free) nicotine/gram), to an accuracy level of two decimal places for each brand name (e.g., Skoal Bandits Wintergreen, Skoal Long Cut Cherry, Skoal Long Cut Wintergreen, etc.). All data should include the mean value with a 95% confidence interval, the range of values, the number of samples tested, the number of lots per brand name, and the estimated precision of the mean. Information will be reported for each manufacturer and variety (including brand families and brand variations) and brand name (e.g., Skoal Bandits Wintergreen, Skoal Long Cut Cherry, Skoal Long Cut Wintergreen, etc.).

Sample calculation:

Mean total nicotine = 10.30 (mg/g)

Mean pH = 7.50

pKa = 8.02

$$pH = pKa + \log\frac{[B]}{[BH^+]}$$

$$7.50 = 8.02 + \log\frac{[\text{un-ionized (free) nicotine}]}{[\text{ionized nicotine}]}$$

$$-0.52 = \log\frac{[\text{un-ionized (free) nicotine}]}{[\text{ionized nicotine}]}$$

$$0.302 = \frac{[\text{un-ionized (free) nicotine}]}{[\text{ionized nicotine}]}$$

$$\%\ \text{un-ionized (free) nicotine} = \frac{\frac{[B]}{[BH^+]}}{\frac{[B]}{[BH^+]}+1}\times 100$$

$$\%\ \text{un-ionized (free) nicotine} = \frac{0.302}{0.302+1}\times 100$$

% un-ionized (free) nicotine = 23.20

$$\text{Total free nicotine (mg/g)} = \text{total nicotine} \times \frac{\%\ \text{un-ionized (free) nicotine}}{100}$$

$$\text{Total free nicotine (mg/g)} = 10.30 \times \frac{23.20}{100}$$

Total free nicotine (mg/g) = 2.39

V. Assay Criteria for Quality Assurance

A. Establishing Limits for Quality Control Parameters

All quality control parameters must be determined within the laboratory in which they are to be used. At least 10 within-laboratory runs must be performed to establish temporary confidence intervals for the quality control parameters. Permanent limits should be established after 20 runs and should be reestablished after each additional 20 runs.

B. Exclusion of Outliers from the Calibration Curve [18]

The coefficient of determination between $Area_{nicotine}/Area_{IS}$ and nicotine concentration should be equal to 0.99 or higher. Any calibration standard having an estimated concentration computed from the regression equation (Equation 1) which is different from its actual concentration by a factor of 10% can be excluded from the calibration curve. Up to two concentrations may be excluded, but caution should be used in eliminating values, since bias may be increased in the calibration curve. If an outlier value is eliminated, its duplicate value must also be discarded to avoid producing a new bias. All unknowns must fall within the calibration curve; therefore, duplicate values excluded at either end of the calibration curve will restrict the useful range of the assay.

C. Quality Control Pools and Run Rejection Rules

The mean estimated nicotine concentration in a pool should be compared with the established limits for that pool based on at least 20 consecutive runs. An analytical run should be accepted or rejected based upon the following set of rules adapted from Westgard *et al.* (1981).

1. When the mean of one QC pool exceeds the limit of x ± 3 standard deviations (SD), then the run is rejected as out of control. Here, x and SD represent the overall mean and standard deviation of all estimated nicotine concentrations for a particular pool in the runs which were used to establish the control limits.

2. When the mean nicotine concentrations in two QC pools in the same run exceed the same direction, then the run must be rejected. The same direction is the condition in which both pools exceed either the x + 2 SD or the x -2 SD limits.

3. When the mean nicotine concentrations in one or two QC pools exceed their x ± 2 SD limits in the same direction in two consecutive runs, then both runs must be rejected.

4. When the mean nicotine concentrations in two QC pools are different by more than a total of 4 SD, then the run must be rejected. This condition may occur, for example, when one QC pool is 2 SD greater than the mean, and another is 2 SD less than the mean.

Endnotes

The comments and notes listed below can be described as Good Laboratory Practice guidelines; they are described in detail in this protocol to ensure minimal interlaboratory variability in the determination of nicotine, total moisture, and pH in smokeless tobacco.

[1] This protocol assumes that the testing facility will implement and maintain a stringent Quality Assurance/Quality Control program to include, but not be limited to, regular interlaboratory comparisons, determination of the quality and purity of purchased products, and proper storage and handling of all reagents and samples.

[2] When a specific product or instrument is listed, it is the product or instrument that was used in the development of this method. Equivalent products or instruments may also be used. Use of trade names is for identification only and does not constitute endorsement by the Public Health Service or the U.S. Department of Health and Human Services.

[3] All chemicals, solvents, and gases are to be of the highest purity.

[4] Companies must ensure that the purity of the nicotine base is certified by the vendor and that the chemical is properly stored. However, nicotine base oxidizes with storage, as reflected by the liquid turning brown. If oxidation has occurred, the nicotine base should be distilled prior to use in making a standard solution.

[5] A suggested method for the determination of nicotine purity is CORESTA Recommended Method No. 39.

[6] Horizontal shaking will allow more intimate contact of this three phase extraction. There is a minimal dead volume in the tube due to the large sample size and extraction volume. This necessitates horizontal shaking.

[7] If a linear shaker is not available, a wrist action shaker using 250 mL stoppered Erlenmeyer flasks can be substituted. Values for nicotine are equivalent to those obtained from the linear shaker.

[8] After installing a new column, condition the column by injecting a tobacco sample extract on the column, using the described column conditions. Injections should be repeated until areas of IS and nicotine are reproducible. This will require approximately four injections. Recondition column when instrument has been used infrequently and after replacing glass liner.

[9] Glass liner and septum should be replaced after every 100 injections.

[10] Most older instruments operate at constant pressure. To reduce confusion, it is suggested that the carrier gas flow through the column be measured at the initial column temperature.

[11] The testing facility must ensure that samples are obtained through the use of a survey design protocol for sampling ''at one point in time'' at the factory or warehouse. The survey design protocol must address short-, medium-, and long-term smokeless tobacco product variability (*e.g.*, variability over time and from container to container of the tobacco product) in a manner equivalent to that described for cigarette sampling in Annex C of ISO Protocol 8243. Information accompanying results for each sample should include, but not be limited to:

For each product—manufacturer and variety (including brand families and brand variations) and brand name (*e.g.*, Skoal Bandits, Skoal Long Cut Cherry, Skoal Long Cut Wintergreen, etc.):

1. Product ''category,'' *e.g.*, loose leaf, plug, twist, dry snuff, moist (wet) snuff, etc.

2. Lot number.

3. Lot size.

4. Number of randomly sampled, sealed, packaged (so as to be representative of the product that is sold to the public) smokeless tobacco products selected (sampling fraction) for nicotine, moisture, and pH determination.

5. Documentation of method used for random sample selection.

6. '''Age'' of product when received by testing facility and storage conditions prior to analysis.

[12] Extraction of nicotine and pH determination must be performed with reagents and samples at a room temperature of 22–25°C. Room temperature should not vary more than 1°C during extraction of nicotine or pH determination.

[13] Use non-glass 10 mL repipette for transferring NaOH solution.

[14] Use 50 mL repipette for transferring MTBE.

[15] For dry snuff, use 0.500 ± 0.010 gram sample.

[16] The testing facility is referred to ISO Procedure 8243 for a discussion of sample size and the effect of variability on the precision of the mean of the sample (ISO 8243, 1991).

[17] When analyzing new smokeless tobacco products, extract product without IS to determine if any

components co-elute with the IS or impurities in the IS. This interference could artificially lower calculated values for nicotine.

[18] The calculated nicotine values for all samples must fall within the low and high nicotine values used for the calibration curve. If not, prepare a fresh nicotine standard solution and an appropriate series of standard nicotine dilutions. Determine the detector response for each standard using chromatographic conditions described in I.E.

[19] The testing frequency for each smokeless tobacco brand name (*e.g.*, Skoal Bandits Wintergreen, Skoal Long Cut Cherry, Skoal Long Cut Wintergreen, etc.) is based on the manufacturing duration (refer to table below). Each smokeless tobacco brand name will be sampled and tested for nicotine, total moisture, and pH no fewer than twice and no more than four times during a calendar year.

Manufacturing duration in weeks	Test frequency*
up to and including 4	2
up to and including 28	3
up to and including 52	4

*Use a statistical program to determine random sampling dates based on the total manufacturing duration during a calendar year. Sampling dates should fall on actual manufacturing days for the product when test material that is representative of the product that is sold to the public (consisting of sealed, packaged samples) is available. If a statistically determined sampling date falls on a day that does not meet this criterion, sample the product on the next date that does meet the criteria.

For smokeless tobacco brand names with episodic production during a calendar year, the total number of sampling dates is determined by the sum of the individual test frequencies, not to exceed four. For the purpose of the Protocol, episodic production is defined as manufacturing intervals separated by periods of 30 or more days when the smokeless tobacco brand name is not manufactured.

Example 1: Within a single calendar year a smokeless tobacco brand name is manufactured from January 1 to March 31 and from September 1 to December 15. The testing frequency for the first manufacturing interval is 3 and for the second manufacturing interval is 3. The Protocol allows that each smokeless tobacco brand name be tested for nicotine, total moisture, and pH no more than four times during a calendar year. Therefore, 4 random sampling dates, as described in the footnote to the above table, are determined for the smokeless tobacco brand name. The values for nicotine, moisture, and pH determinations, and unionized (free) nicotine calculations and the mean of the 4 data points for that smokeless tobacco brand name are reported.

Example 2: Within a single calendar year a smokeless tobacco brand name is manufactured from April 5 to May 3 and from September 1 to December 15. The testing frequency for the first manufacturing interval is 2 and for the second manufacturing interval is 3. The values for nicotine, moisture, and pH determinations, and unionized (free) nicotine calculations and the mean of the 4 data points for that smokeless tobacco brand name are reported.

Example 3: Within a single calendar year a smokeless tobacco brand name is manufactured from January 1 to January 15 and from September 1 to September 22. The testing frequency for the first manufacturing interval is 2 and for the second manufacturing interval is 2. Four random sampling dates are selected to fall within the 6 weeks of manufacturing for the smokeless tobacco brand name. The values for nicotine, moisture, and pH determinations, and unionized (free) nicotine calculations and the mean of the 4 data points for that smokeless tobacco brand name are reported.

[20] The method is a modification of AOAC Method 966.02 (1990) in that the ground tobacco passes through a 4 mm screen rather than a 1 mm screen.

[21] When drying samples, do not dry different products (e.g., moist (wet) snuff, dry snuff, loose leaf) in the oven at the same time since this will produce errors in the moisture determinations.

[22] The method is a modification of a method published by Henningfield *et al.* (1995).

References

AOAC (Association of Official Analytical Chemists). Official Methods of Analysis. 966.02: Moisture in Tobacco. (1990) Fifth Edition. K. Helrich (ed). Association of Official Analytical Chemists, Inc., Suite 400, 2200 Wilson Boulevard, Arlington, Virginia 22201 USA.

CORESTA (Centre de Coopération pour les Recherches Scientifiques relatives au Tabac). Recommended Method No. 39: Determination of the purity of nicotine and nicotine salts by gravimetric analysis—Tungstosilic acid method. November, 1994. 87–90.

CRC Handbook of Chemistry and Physics. R.C. Weast, D.R. Lide, M.J. Astle, and WH. Beyer (eds). 70th ed. Boca Raton, Florida: CRC Press (1989–1990) D–162.

Henningfield, J.E., Radzius A., Cone E.J. (1995). Estimation of available nicotine content of six smokeless tobacco products. Tobacco Control 4:57–61.

ISO (International Organization for Standardization). IOS 8243: Cigarettes—Sampling. (1991). Second Edition. Prepared by Technical Committee ISO/TC 126, Tobacco and tobacco products. International Organization for Standardization, Case Postale 56, CH–1211 Genve 20, Switzerland.

Westgard J.O., Barry P., Hunt M., and Groth T. (1981). A multi-rule Shewhart chart for quality control in clinical chemistry. Clinical Chemistry 27:493.

[FR Doc. E9–19 Filed 1–6–09; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review, Special Emphasis Panel, Member Conflict: Auditory Neuroscience.

Date: January 22–23, 2009.

Time: 6 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting)

Contact Person: John Bishop, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5180, MSC 7844, Bethesda, MD 20892, (301) 435–1250, *bishopj@csr.nih.gov.*

Name of Committee: Center for Scientific Review, Special Emphasis Panel, Epidemiology and Genetics of Aging and Neurodegenerative Diseases.

Date: January 23, 2009.

Time: 12 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Fungai F. Chanetsa, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3135, MSC 7770, Bethesda, MD 20892, 301–435–1262, *chanetsaf@csr.nih.gov.*

Name of Committee: Center for Scientific Review, Special Emphasis Panel, Member Conflicts: Alcohol and Toxicology.

Date: January 28–29, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting)
Contact Person: Christine L. Melchior, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5176, MSC 7844, Bethesda, MD 20892, (301) 435–1713, *melchioc@csr.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience. Integrated Review Group Neurogenesis and Cell Fate Study Section.
Date: January 29–30, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Westin St. Francis Hotel, 335 Powell Street, San Francisco, CA 94102.
Contact Person: Lawrence Baizer, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4152, MSC 7850, Bethesda, MD 20892, (301) 435–1257, *baizerl@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience, Integrated Review Group Cell Death in Neurodegeneration Study Section.
Date: February 2–3, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: InterContinental Mark Hopkins San Francisco Hotel, One Nob Hill, San Francisco, CA 94108.
Contact Person: Boris P. Sokolov, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5217A, MSC 7846, Bethesda, MD 20892, 301–435–1197, *bsokolov@csr.nih.gov.*

Name of Committee: Health of the Population, Integrated Review Group, Neurological, Aging and Musculoskeletal Epidemiology Study Section.
Date: February 4–5, 2009.
Time: 8:30 a.m. to 2 p.m.
Agenda: To review and evaluate grant applications.
Place: Bahia Resort Hotel, 998 West Mission Bay Drive, San Diego, CA 92109.
Contact Person: Heidi B. Friedman, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1012A, MSC 7770, Bethesda, MD 20892, 301–435–1721, *hfriedman@csr.nih.gov.*

Name of Committee: Health of the Population, Integrated Review Group, Community-Level Health Promotion Study Section.
Date: February 5–6, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Best Western Tuscan Inn, 425 North Point Street, San Francisco, CA 94133.
Contact Person: William N. Elwood, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3162, MSC 7770, Bethesda, MD 20892, 301/435–1503, *elwoodwi@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience, Integrated Review Group Brain Injury and Neurovascular, Pathologies Study Section.
Date: February 5–6, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: InterContinental Mark Hopkins San Francisco Hotel, One Nob Hill, San Francisco, CA 94108.
Contact Person: Alexander Yakovlev, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5206, MSC 7846, Bethesda, MD 20892, 301–435–1254, *yakovleva@csr.nih.gov.*

Name of Committee: Emerging Technologies and Training Neurosciences, Integrated Review Group Neurotechnology Study Section.
Date: February 5–6, 2009.
Time: 8 a.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: Catamaran Resort Hotel and Spa, 3999 Mission Boulevard, San Diego, CA 92109.
Contact Person: Robert C. Elliott, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3130, MSC 7850, Bethesda, MD 20892, 301–435–3009, *elliotro@csr.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience, Integrated Review Group Neurobiology of Motivated Behavior Study Section.
Date: February 5–6, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Bahia Resort, 998 W. Mission Bay Drive, San Diego, CA 92109.
Contact Person: Edwin C. Clayton, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5095C, MSC 7844, Bethesda, MD 20892, (301) 402–1304, *claytone@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes, Integrated Review Group, Language and Communication Study Section.
Date: February 5, 2009.
Time: 8 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: Serrano Hotel, 405 Taylor Street, San Francisco, CA 94102.
Contact Person: Weijia Ni, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3184, MSC 7848, Bethesda, MD 20892, (301) 435–1507, *niw@csr.nih.gov.*

Name of Committee: Immunology Integrated Review Group, Hypersensitivity, Autoimmune, and Immune-Mediated Diseases Study Section.
Date: February 5–6, 2009.
Time: 8:00 a.m. to 7:00 p.m.
Agenda: To review and evaluate grant applications.
Place: The Westin St. Francis, 335 Powell Street, San Francisco, CA 94102
Contact Person: Bahiru Gametchu, DVM, PhD., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4204, MSC 7812, Bethesda, MD 20892, 301–435–1225, *gametchb@csr.nih.gov.*

Name of Committee: Immunology Integrated Review Group, Cellular and Molecular Immunology—B Study Section.
Date: February 5–6, 2009.
Time: 8:00 a.m. to 2:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Hilton Washington DC/Silver Spring, 8727 Colesville Road, Silver Spring, MD 20910.
Contact Person: Betty Hayden, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4206, MSC 7812, Bethesda, MD 20892, 301–435–1223, *haydenb@csr.nih.gov.*

Name of Committee: Center for Scientific Review, Special Emphasis Panel, Member Conflicts in Biological Chemistry and Macromolecular Biophysics.
Date: February 5–6, 2009.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting)
Contact Person: Donald L. Schneider, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5160, MSC 7842, Bethesda, MD 20892, (301) 435–1727, *schneidd@csr.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group Macromolecular Structure and Function C Study Section.
Date: February 5–6, 2009.
Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Doubletree Hotel O'Hare-Rosemond, 5460 North River Road, Rosemont, IL 20018.
Contact Person: Denise Beusen, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4142, MSC 7806, Bethesda, MD 20892, (301) 435–1267, *beusend@csr.nih.gov.*

Name of Committee: Cell Biology Integrated Review Group Cellular Signaling and Regulatory Systems Study Section
Date: February 5–6, 2009.
Time: 8:00 a.m. to 5:30 p.m.
Agenda: To review and evaluate grant applications.
Place: Sheraton Fisherman's Wharf Hotel, 2500 Mason Street, San Francisco, CA 94133.
Contact Person: Elena Smirnova, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5187, MSC 7840, Bethesda, MD 20892, 301–435–1236, *smirnove@csr.nih.gov.*

Name of Committee: Cell Biology Integrated Review Group, Cell Structure and Function Study Section.

Date: February 5–6, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Sheraton Fisherman's Wharf Hotel, 2500 Mason Street, San Francisco, CA 94133.
Contact Person: Alexandra M. Ainsztein, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5140, MSC 7840, Bethesda, MD 20892, 301–451–3848, *ainsztea@csr.nih.gov*.

Name of Committee: Biological Chemistry and Macromolecular Biophysics, Integrated Review Group Macromolecular Structure and Function B Study Section.
Date: February 5–6, 2009.
Time: 8 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: The Westin St. Francis, 335 Powell Street, San Francisco, CA 94102.
Contact Person: Arnold Revzin, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4146, MSC 7824, Bethesda, MD 20892, (301) 435–1153, *revzina@csr.nih.gov*.

Name of Committee: Integrative, Functional and Cognitive Neuroscience, Integrated Review Group Neurobiology of Learning and Memory Study Section.
Date: February 5–6, 2009.
Time: 8 a.m. to 8 p.m.
Agenda: To review and evaluate grant applications.
Place: Bahia Resort, 998 W. Mission Bay Drive, San Diego, CA 92109.
Contact Person: Bernard F. Driscoll, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5184, MSC 7844, Bethesda, MD 20892, 301–435–1242. *driscolb@csr.nih.gov*.

Name of Committee: Cardiovascular Sciences Integrated Review Group, Electrical Signaling, Ion Transport, and Arrhythmias Study Section.
Date: February 5, 2009.
Time: 8 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.
Contact Person: Rajiv Kumar, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4122, MSC 7802, Bethesda, MD 20892, 301–435–1212, *kumarra@csr.nih.gov*.

Name of Committee: Biobehavioral and Behavioral Processes, Integrated Review Group, Biobehavioral Mechanisms of Emotion, Stress and Health Study Section.
Date: February 5–6, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.
Contact Person: Maribeth Champoux, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3170, MSC 7848, Bethesda, MD 20892, (301) 594–3163, *champoum@csr.nih.gov*.

Name of Committee: Immunology Integrated Review Group, Immunity and Host Defense Study Section.
Date: February 5–6, 2009.
Time: 8 a.m. to 2 p.m.
Agenda: To review and evaluate grant applications.
Place: The Westin St. Francis Hotel, 335 Powell Street, San Francisco, CA 94102.
Contact Person: Patrick K. Lai, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2215, MSC 7812, Bethesda, MD 20892, 301–435–1052, *laip@csr.nih.gov*.

Name of Committee: Health of the Population Integrated Review Group, Nursing Science: Children and Families Study Section.
Date: February 5, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Sir Francis Drake Hotel, 450 Powell Street, San Francisco, CA 94102.
Contact Person: Melinda Tinkle, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3141, MSC 7770, Bethesda, MD 20892, (301) 594–6594, *tinklem@csr.nih.gov*.

Name of Committee: Risk, Prevention and Health Behavior, Integrated Review Group Psychosocial Development, Risk and Prevention Study Section.
Date: February 5–6, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: The Fairmont Washington, D.C., 2401 M Street, NW., Washington, DC 20037.
Contact Person: Anna L. Riley, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3114, MSC 7759, Bethesda, MD 20892, 301–435–2889, *rileyann@csr.nih.gov*.

Name of Committee: Health of the Population, Integrated Review Group, Behavioral Genetics and Epidemiology Study Section.
Date: February 5–6, 2009.
Time: 8 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Sir Francis Drake Hotel, 450 Powell Street, San Francisco, CA 94102.
Contact Person: Elisabeth Koss, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3152, MSC 7770, Bethesda, MD 20892, (301) 435–1721, *kosse@csr.nih.gov*.

Name of Committee: Infectious Diseases and Microbiology, Integrated Review Group, Virology—B Study Section.
Date: February 5–6, 2009.
Time: 8 a.m. to 4 p.m.
Agenda: To review and evaluate grant applications.
Place: Washington Plaza, 10 Thomas Circle, NW., Washington, DC 20005.
Contact Person: Robert Freund, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3200, MSC 7848, Bethesda, MD 20892, 301–435–1050, *freundr@csr.nih.gov*.

Name of Committee: Health of the Population, Integrated Review Group, Health Services Organization and Delivery Study Section.
Date: February 5–6, 2009.
Time: 8:30 a.m. to 6 p.m.
Agenda: To review and evaluate grant applications.
Place: The Fairmont Washington, DC, 2401 M Street, NW., Washington, DC 20037.
Contact Person: Kathy Salaita, SCD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3172, MSC 7770, Bethesda, MD 20892, 301–451–8504, *salaitak@csr.nih.gov*.

Name of Committee: Brain Disorders and Clinical Neuroscience, Integrated Review Group Neural Basis of Psychopathology, Addictions and Sleep Disorders Study Section.
Date: February 5–6, 2009.
Time: 8:30 a.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn San Francisco Fisherman's Wharf, 1300 Columbus Avenue, San Francisco, CA 94133.
Contact Person: Julius Cinque, MS, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5186, MSC 7846, Bethesda, MD 20892, (301) 435–1252, *cinquej@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 22, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–31381 Filed 1–6–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2008–0204]

Homeland Security Information Network Advisory Committee

ACTION: Committee Management; Notice of Federal Advisory Committee Teleconference Meeting.

SUMMARY: The Homeland Security Information Network Advisory Committee will hold a teleconference call on January 13, 2008, to discuss implementation efforts associated with the Next Generation of the Homeland Security Information Network. Teleconference call dates may be subject to change. Please contact Niklaus Welter in advance of the call to confirm that the call will take place.

DATES: The teleconference call will take place on Tuesday, 13 January, 2009, at 2–3 p.m. EST.

ADDRESSES: Members of the public may monitor the call by calling 1–800–882–3610, to be followed by this PIN, 1782344#. Members of the public are welcome to monitor the call; however, the number of teleconference lines is limited and available on a first-come, first-served basis. Questions or Comments must be identified by DHS–2008–0204 and may be submitted by one of the following methods:

- *Federal eRulemaking Portal:*
- *http://www.regulations.gov*. Follow the instructions for submitting questions or comments.
- *E-mail: Niklaus.Welter@dhs.gov*. Include the docket number, DHS–2008–0204 in the subject line of the message.
- *Fax:* 202–282–8806.
- *Mail:* Niklaus Welter, Department of Homeland Security, 245 Murray Lane, SW., Building 410, Washington, DC 20528.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov*, including any personal information provided.

Docket: For access to the docket to read background documents or comments received by the Homeland Security Information Network Advisory Committee, go to *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Niklaus Welter, 245 Murray Lane SW., Bldg 410, Washington, DC 20528, *Niklaus.Welter@dhs.gov*, 202–282–8336, fax 202–282–8806.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. (Pub. L. 92–463). The Homeland Security Information Network Advisory Committee will have a conference call to discuss implementation efforts associated with the Next Generation of the Homeland Security Information Network. The Homeland Security Information Network Advisory Committee provides advice and recommendations to the Secretary through the Director, Operations Coordination and Planning on matters relating to gathering and incorporating user requirements into the Homeland Security Information Network.

The Committee will discuss the above issues from approximately 2–3 p.m. EST. Teleconference Call dates may be subject to change. Please contact Niklaus Welter in advance of the call to confirm that the call will take place.

The chairperson of the Homeland Security Information Network Advisory Committee shall conduct the teleconference in a way that will, in his judgment, facilitate the orderly conduct of business. Please note that the teleconference may end early if all business is completed.

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Niklaus Welter as soon as possible.

Dated: December 31, 2008.

Roger T. Rufe, Jr.,

Director, Operations Coordination and Planning.

[FR Doc. E9–44 Filed 1–6–09; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2008–0127]

Privacy Act of 1974; Department of Homeland Security/Federal Emergency Management Agency/GOVT–001 National Defense Executive Reserve System of Records

AGENCY: Privacy Office; DHS.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974 and as part of the Department of Homeland Security's ongoing effort to review and update legacy system of records notices, the Department of Homeland Security is giving notice that it proposes to update and reissue the following legacy record system FEMA/GOVT–1 National Defense Executive Reserve System as a Department of Homeland Security/Federal Emergency Management Agency/Federal Government system of records notice titled, DHS/FEMA/GOVT–001 National Defense Executive Reserve System. Categories of individuals, categories of records, and the routine uses of this legacy system of records notice have been reviewed and updated to better reflect the Department of Homeland Security/Federal Emergency Management Agency/Federal Government National Defense Executive Reserve records. This new system will be included in the Department of Homeland Security's inventory of record systems.

DATES: Written comments must be submitted on or before February 6, 2009.

ADDRESSES: You may submit comments, identified by docket number DHS–2008–0127 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 703–483–2999.
- *Mail:* Hugo Teufel III, Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.
- *Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change and may be read at *http://www.regulations.gov*, including any personal information provided.
- *Docket:* For access to the docket, to read background documents, or comments received, go to *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: For general questions please contact: The Federal Emergency Management Agency Privacy Officer, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472. For privacy issues please contact: Hugo Teufel III (703–235–0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to the savings clause in the Homeland Security Act of 2002, Public Law 107–296, Section 1512, 116 Stat. 2310 (November 25, 2002), the Department of Homeland Security (DHS)/Federal Emergency Management Agency (FEMA)/Federal Government have relied on preexisting Privacy Act systems of records notices for the collection and maintenance of records that concern the National Defense Executive Reserve.

As part of its efforts to streamline and consolidate its record systems, DHS is updating and reissuing a system of records under the Privacy Act (5 U.S.C. 552a) that deals with the National Defense Executive Reserve. Individuals of the National Defense Executive Reserve voluntarily apply for assignments. Some individuals are already government employees and others are private sector employees who would not be considered government employees unless asked to perform emergency duties after the President of the United States declares a mobilization. Assignments are made in three year increments and may either be redesignated or terminated. Individuals

may, at any time, request voluntarily termination. This record system will allow the Federal Government to collect and preserve records regarding applicants for and members of the National Defense Executive Reserve. The collection and maintenance of this information will assist the Federal Government in coordinating and administering the National Defense Executive Reserve.

In accordance with the Privacy Act of 1974 and as part of DHS's ongoing effort to review and update legacy system of records notices, DHS is giving notice that it proposes to update and reissue the following legacy record system DHS/FEMA/GOVT–1 National Defense Executive Reserve System (55 FR 37182 September 7, 1990) as a DHS/FEMA/Federal Government system of records notice titled, DHS/FEMA/GOVT–001 National Defense Executive Reserve System. Categories of individuals and categories of records have been reviewed, and the routine uses of this legacy system of records notice have been updated to better reflect the DHS/FEMA/Federal Government's National Defense Executive Reserve records. This new system will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which the United States Government collects, maintains, uses, and disseminates individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency for which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass United States citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors. Individuals may request access to their own records that are maintained in a system of records in the possession or under the control of DHS by complying with DHS Privacy Act regulations, 6 CFR Part 5.

The Privacy Act requires each agency to publish in the **Federal Register** a description denoting the type and character of each system of records that the agency maintains, and the routine uses that are contained in each system in order to make agency record keeping practices transparent, to notify individuals regarding the uses of their records, and to assist individuals to more easily find such files within the agency. Below is the description of the National Defense Executive Reserve System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this updated system of records to the Office of Management and Budget and to Congress.

System of Records

DHS/FEMA/GOVT–001

SYSTEM NAME:

Federal Emergency Management Agency National Defense Executive Reserve System.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records may be maintained in the personnel office, emergency preparedness unit, or other designated offices located at the local installation of the department or agency which currently employs the individual.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals include applicants for and members of the National Defense Executive Reserve assignments.

CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records in this system include:

- FEMA Form 85–3, National Defense Executive Reserve Personal Qualifications Statement. This Form includes:
- Individual's name;
- Social security number;
- Home mailing address;
- Home telephone number;
- Home e-mail address;
- Date of birth;
- Birthplace;
- Employment experience; and
- Professional memberships.
- Other personnel and administrative records, skills inventory, training data, and other related records necessary to coordinate and administer the program.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Defense Production Act of 1950, E.O. 11179 dated September 22, 1964, as amended by E.O. 12148 dated July 20, 1979, 5 U.S.C. 301; the Federal Records Act, 44 U.S.C. 3101; Executive Order 9397.

PURPOSE(S):

The purpose of this system is to collect and preserve records regarding applicants for and members of the National Defense Executive Reserve. The collection and maintenance of this information will assist the Federal Government in coordinating and administering the National Defense Executive Reserve

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records of information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when it is necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee of DHS in his/her official capacity;

3. Any employee of DHS in his/her individual capacity where DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof, is a party to the litigation or has an interest in such litigation, and DHS determines that the records are both relevant and necessary to the litigation and the use of such records is compatible with the purpose for which DHS collected the records.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual about whom the record pertains.

C. To the National Archives and Records Administration or other Federal government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency, organization, or individual for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the

security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) or harm to the individual who relies upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate Federal, State, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, where a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To the Association of the National Defense Executive Reserve and the National Defense Executive Reserve Conference Association to facilitate training and relevant information dissemination efforts for reservists in the National Defense Executive Reserve.

I. To an appropriate Federal, State, local, tribal, foreign, or international agency, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit and when disclosure is appropriate to the proper performance of the official duties of the person making the request.

J. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosure to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena from a court of competent jurisdiction.

K. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of DHS or is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records in this system are stored electronically or on paper in secure facilities in a locked drawer behind a locked door. The records are stored on magnetic disc, tape, digital media, and CD-ROM.

RETRIEVABILITY:

Records may be retrieved by individual's name, social security number, specific skill area of the applicant, or agency.

SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

Case files on reservists are maintained in accordance with Item 29a, GRS 18, Security and Protective Services Records, and destroyed five years after termination from the NDER program. Case files on individuals whose applications were rejected or withdrawn are destroyed when five years old in accordance with Item 29b, GRS 18. FEMA will review this retention schedule and work with NARA to determine whether it remains appropriate.

SYSTEM MANAGER AND ADDRESS:

Associate Director, National Preparedness Directorate, Federal Emergency Management Agency, Washington, DC 20472, will maintain a computerized record of all applications and assignments of National Defense Executive Reserve reservists for the Federal Government as well as the personnel files for all individuals assigned to the Federal Emergency Management Agency. The departments and agencies will maintain their own personnel records on those individuals assigned to their respective department or agency.

NOTIFICATION PROCEDURE:

Individuals wishing to inquire whether this system of records contains information about themselves should submit their inquiries to:

(a) NDER applicants/assignees to DHS/FEMA—Federal Emergency Management Agency, Associate Director, National Preparedness Directorate, Washington, DC 20472;

(b) NDER applicants/assignees to Federal departments and/or agencies other than DHS—contact the agency personnel, emergency preparedness unit, or Privacy Act Officer to determine location of records within the department/agency. Individuals must include their full name, date of birth, social security number, current address, and type of assignment/agency they applied with to be an NDER reservist.

RECORD ACCESS PROCEDURES:

Individuals/applicants/assignees to DHS/FEMA wishing to access records containing information about themselves should follow the record access procedures that are outlined in FEMA's and DHS' Privacy Act regulations, 44 CFR Part 6 and 6 CFR Part 5. Requests for Privacy Act protected information must be made in writing and clearly marked as a ''Privacy Act Request.'' The name of the requester, the nature of the record sought, and the required verification of identity must be clearly indicated. Requests should be sent to: FOIA Officer, Records Management, Federal Emergency Management Agency, Department of Homeland Security, 500 C Street, SW., Washington, DC 20472.

Individuals/applicants/assignees to Federal departments and/or agencies other than DHS should follow ''Notification procedure (b)'' above.

CONTESTING RECORD PROCEDURES:

See ''Record access procedures'' above.

RECORD SOURCE CATEGORIES:

The individuals to whom the record pertains. Prior to being designated as a National Defense Executive Reserve reservist, the applicant must successfully complete a background investigation conducted by the Office of Personnel Management which may include reference checks of prior employers, educational institutions attended, police records, neighborhoods, and present and past friends and acquaintances.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: December 23, 2008.

Hugo Teufel III,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. E9–45 Filed 1–6–09; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R9–IA–2008–N0350; 96100–1671–000–P5]

Harvest and Export of American Ginseng

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice: announcement of public meeting; request for information from the public.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a public meeting on American ginseng *(Panax quinquefolius).* This meeting will help us gather information from the public in preparation of our 2009 findings on the export of American ginseng roots, for the issuance of permits under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

DATES: The meeting date is February 24, 2009. An information session will occur at 8 a.m. to 2 p.m., followed by a public meeting at 2 p.m. to 5:30 p.m.

ADDRESSES: The meeting location is: Bristol, VA—Holiday Inn Hotel and Suites, Bristol Convention Center, 3005 Linden Drive, Bristol, VA 24202; telephone number: (276) 466–4100.

FOR FURTHER INFORMATION CONTACT: For further information, or directions to the meeting, contact Ms. Pat Ford, Division of Scientific Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 110, Arlington, VA 22203; 703–358–1708 (telephone), 703–358–2276 (fax), or *patricia_ford@fws.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

Background

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, or Convention) is an international treaty designed to control and regulate international trade in certain animal and plant species that are now or potentially may be threatened with extinction by international trade. Currently, 174 countries, including the United States, are Parties to CITES. The species for which trade is controlled are listed in Appendix I, II, or III of the Convention. Appendix I includes species threatened with extinction that are or may be affected by international trade. Commercial trade in Appendix–I species is generally prohibited. Appendix II includes species that, although not necessarily threatened with extinction at the present time, may become so unless their trade is strictly controlled through a system of export permits. Appendix II also includes species that CITES must regulate so that trade in other listed species may be brought under effective control (*e.g.,* because of similarity of appearance between listed species and other species). Appendix III comprises species subject to regulation within the jurisdiction of any CITES Party country to enlist the cooperation of the other Parties in regulating international trade in the species.

American ginseng *(Panax quinquefolius)* was listed in Appendix II of CITES on July 1, 1975. The Division of Scientific Authority and the Division of Management Authority of the Service regulate the export of American ginseng, including whole live or dead plants, whole and sliced roots, and parts of roots. To meet CITES requirements for export of American ginseng from the United States, the Division of Scientific Authority must determine that the export will not be detrimental to the survival of the species, and the Division of Management Authority must be satisfied that the American ginseng roots to be exported were legally acquired.

The Divisions of Scientific Authority and Management Authority make the required findings on a State-by-State basis. To determine whether or not to approve exports of American ginseng, the Division of Scientific Authority reviews available information from various sources (other Federal agencies, State regulatory agencies, industry and associations, nongovernmental organizations, and academic researchers) on the biology and trade status of the species. After a thorough review, the Division of Scientific Authority makes a non-detriment finding and the Division of Management Authority makes a legal acquisition finding on the export of American ginseng to be harvested during the year(s) in question. With the exception of 2005, from 1999 through 2008, the Division of Scientific Authority included in its non-detriment findings for the export of wild and wild-simulated American ginseng roots an age-based restriction (i.e., plants must be at least 5 years old).

States with harvest programs for wild and artificially propagated American ginseng are: Alabama, Arkansas, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Minnesota, Missouri, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin. States with harvest programs for only artificially propagated American ginseng are: Idaho, Maine, Michigan, North Dakota, Oregon, and Washington.

The Divisions of Scientific Authority and Management Authority will host an American ginseng workshop from February 24 through 26, 2009, in Bristol, Virginia, with representatives of State and Federal agencies that regulate the species, to discuss the status and management of American ginseng and the CITES export program for the species. This workshop will provide an important opportunity for representatives of the States and Federal agencies to discuss and consider improvements to the CITES export program for this species. Except for the session on February 24, 2009, this meeting will be closed to the public.

Information from the 2009 U.S. Fish and Wildlife Service's American ginseng workshop will be available from our Web site at: *http://www.fws.gov/international/DMA_DSA/CITES/plants/ginseng.html*; information will also be available upon request from the Division of Scientific Authority (see **FOR FURTHER INFORMATION CONTACT**).

Public Meeting

We invite the public to listen to academic and Federal government researchers, who will present their most recent research findings on American ginseng, and other invited speakers on February 24, 2009, in Bristol, VA., from 8 a.m. to 2 p.m. (with a lunch break at attendees' expense). After these presentations, from 2 p.m. to 5:30 p.m., we will hold an open public meeting (a

listening session) to hear from anyone involved or interested in American ginseng conservation, harvest, and trade. We are particularly interested in obtaining any current information on the status of American ginseng in the wild, and other pertinent information on the conservation and management of the species that would contribute to making the required CITES findings and improve the CITES export program for American ginseng. We will discuss the Federal regulatory framework for the export of American ginseng and the regulations that control the international trade of this species. We will also discuss the different CITES definitions as they are applied to American ginseng grown under different production systems and how we approach these different systems in regulating the export of American ginseng roots.

Persons planning to attend the February 24, 2009, meeting who require interpretation for the hearing impaired must notify the Division of Scientific Authority by January 23, 2009 (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary author of this notice is Patricia Ford, the Division of Scientific Authority, U.S. Fish and Wildlife Service.

Dated: December 22, 2008.

Kenneth Stansell,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. E8–31471 Filed 1–6–09; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–020–1310–DT 050E]

Notice of Availability of the Record of Decision for the Final Supplement to the Montana Statewide Oil and Gas Environmental Impact Statement and Proposed Amendment of the Powder River and Billings Resource Management Plans

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Availability.

SUMMARY: By Order of the U.S. District Court for the District of Montana, dated April 5, 2005, and pursuant to the Federal Land Policy and Management Act of 1976 and the National Environmental Policy Act of 1969, the Bureau of Land Management (BLM) has prepared the Record of Decision (ROD) approving BLM's 2008 Final Supplement to the Montana Statewide Oil and Gas Environmental Impact Statement and Proposed Amendment of the Powder River and Billings Resource Management Plans (RMP) (Final SEIS/Amendment).

ADDRESSES: Copies of the ROD have been sent to affected Federal, state, and local government agencies; to tribal governments; and to interested parties. Copies of the ROD are available for public inspection at the BLM Miles City Field Office, 111 Garryowen Road, Miles City, Montana; and at the BLM Montana State Office, 5001 Southgate Drive, Billings, Montana. You may also view the ROD on the Internet at *http://www.blm.gov/eis/mt/milescity_seis/.*

FOR FURTHER INFORMATION CONTACT: Mary Bloom, Project Manager, by telephone at (406) 233–2852; by mail at 111 Garryowen Road, Miles City, MT 59301; or by e-mail at *Mary_Bloom@blm.gov.*

SUPPLEMENTARY INFORMATION: The Powder River and Billings Resource Management Plan (RMP) areas comprise approximately 1.5 million acres of BLM-managed surface and 5 million acres of BLM-managed mineral estate. There are approximately 3.2 million acres of BLM-managed oil and gas estate. The Powder River RMP area includes Powder River and Treasure Counties, and portions of Big Horn, Carter, Custer, and Rosebud Counties. The Billings RMP area includes Carbon, Golden Valley, Musselshell, Stillwater, Sweet Grass, Wheatland, and Yellowstone Counties and the remaining portion of Big Horn County. The SEIS supporting the ROD supplements the 2003 *Montana Statewide Final Oil and Gas Environmental Impact Statement and Proposed Amendment of the Powder River and Billings Resource Management Plans* (Statewide Document).

The 90-day public comment period on the Draft SEIS/Amendment ended May 2, 2007. The Final SEIS/Proposed Amendment was made available to the public November 7, 2008. After release of the Final SEIS/Proposed Amendment, and prior to approval of the ROD, the BLM coordinated and consulted with the Montana Governor (43 CFR 1610.3–2).

The Federal Land Policy and Management Act of 1976 and its implementing regulations provide land use planning authority to the Secretary, as delegated to the Assistant Secretary for Land and Minerals Management. Because the ROD was signed by the Assistant Secretary, it is the final decision for the Department of the Interior. Therefore, the decision is not subject to the protest procedures identified at 43 CFR 1610.5–2.

Gene R. Terland,

State Director.

[FR Doc. E9–33 Filed 1–6–09; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–923–1310–FI; WYW143474]

Wyoming: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Proposed Reinstatement of Terminated Oil and Gas Lease.

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement from Abraxas Petroleum Corp. for competitive oil and gas lease WYW143474 for land in Converse County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Pamela J. Lewis, Chief, Branch of Fluid Minerals Adjudication, at (307) 775–6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10.00 per acre, or fraction thereof, per year, and 16-⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW143474 effective December 1, 2008, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. BLM has not issued a valid lease affecting the lands.

Pamela J. Lewis,

Chief, Branch of Fluid Minerals Adjudication.

[FR Doc. E9–20 Filed 1–6–09; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Outer Continental Shelf (OCS) Gulf of Mexico OCS Region, Mid-Atlantic Proposed Oil and Gas Lease Sale 220

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of extension of public comment period.

SUMMARY: The Minerals Management Service hereby gives notice that it is extending the public comment period for the Proposed Oil and Gas Lease Sale 220 Call for Information and Interest/Nominations (Call) and Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) which was published in the **Federal Register** on November 13, 2008, (Volume 73, No. 220) for an additional 15 days. Please see the above notice for more detailed information. Due to the holidays, the MMS will extend the comment period from December 29, 2008, to January 13, 2009.

DATES: Comments must be received no later than January 13, 2009.

FOR FURTHER INFORMATION CONTACT: For information on the Call, please contact Mr. Carrol Williams, Sales and Support Unit Supervisor, Minerals Management Service, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, Telephone: (504) 736–2803. For information on the NOI, you may contact Mr. Gary Goeke, National Environmental Policy Act/Coastal Zone Management Coordination Unit Supervisor, Minerals Management Service, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, Telephone: (504) 736–3233.

Dated: December 19, 2008.

Randall B. Luthi,

Director, Minerals Management Service.

[FR Doc. E8–31473 Filed 1–6–09; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Termination of Preparation of an Environmental Impact Statement for the Special Resource Study for the Delaware Coastal Area in the State of Delaware

AGENCY: National Park Service, Department of the Interior.

ACTION: Termination of preparation of an environmental impact statement.

SUMMARY: This notice announces the termination of the process to develop an Environmental Impact Statement (EIS) for the Special Resource Study for the Delaware Coastal Area. The study area includes the coastal regions of the state of Delaware. A Notice of Intent to Prepare an Environmental Impact Statement was published in the **Federal Register** on May 31, 2007.

Subsequent scoping did not reveal the potential for significant adverse impacts or controversy; therefore, it was determined that an EA would suffice to address National Environmental Policy Act requirements for this study.

The Delaware National Coastal Special Resource Study and Environmental Assessment was made available for public review starting 12/1/2008, and the comment period ended 12/31/2008. Based on the results of public comments, a Finding of No Significant Impact (FONSI) was prepared for review and approval by the NPS Northeast Regional Director.

The study report can be viewed at the NPS Planning, Environment and Public Comment (PEPC) Web site at: *http://parkplanning.nps.gov/*.

FOR FURTHER INFORMATION CONTACT: Terrence Moore, Chief of Park Planning and Compliance, National Park Service, Northeast Region, 200 Chestnut Street, 3rd Floor, Philadelphia, PA 19106.

Dated: November 20, 2008.

Dennis R. Reidenbach,

Director, Northeast Region, National Park Service.

[FR Doc. E9–22 Filed 1–6–09; 8:45 am]

BILLING CODE 4312–J6–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (09–001)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 60 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Dr. Walter Kit, National Aeronautics and Space Administration, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Dr. Walter Kit, NASA Clearance Officer, NASA Headquarters, 300 E Street, SW., JE0000, Washington, DC 20546, (202) 358–1350, *Walter.Kit-1@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The Federal Automotive Statistical Tool (FAST) Reporting of Government-Owned Contractor-Operated Vehicles is an information collection required by Executive Order 13149, ''Greening the Government through Federal Fleet and Transportation Efficiency,'' Section 505. This order requires Federal agencies to ensure that all Government-owned contractor-operated vehicles comply with all applicable goals and other requirements of this order and that these goals and requirements are incorporated into each contractor's management contract. This order requires the Department of Energy (DOE) to issue guidance to agencies and to establish the data collection and reporting system for collecting annual agency performance data on meeting the goals of the order and other applicable statutes and policies, as stated in Section 301(b).

In July 2000, the DOE prepared the Guidance Document for Federal agencies, as required by Executive Order 13149. Section 2–3 requires agencies to report using DOE's Federal Automotive Statistical Tool (FAST). FAST is accessed through *http://fastweb.inel.gov/.*

II. Method of Collection

NASA collects this information electronically through *http://fastweb.inel.gov/.*

III. Data

Title: Federal Automotive Statistical Tool (FAST) Reporting of Government-Owned Contractor-Operated Vehicles.

OMB Number: 2700–0106.

Type of Review: Extension of a currently approved collection.

Affected Public: Federal Government and Business or other for-profit.

Estimated Number of Respondents: 93.

Estimated Time per Response: 15 min/vehicle.

Estimated Total Annual Burden Hours: 425.

Estimated Total Annual Cost: $0.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Walter Kit,

NASA Clearance Officer.

[FR Doc. E9–13 Filed 1–6–09; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (09–002)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 60 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Dr. Walter Kit, National Aeronautics and Space Administration, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Dr. Walter Kit, NASA Clearance Officer, NASA Headquarters, 300 E Street, SW., JE0000, Washington, DC 20546, (202) 358–1350, *Walter.Kit-1@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Aeronautics and Space Administration (NASA) is requesting renewal of an existing collection that is used to help NASA to assess the services provided by its procurement offices. The NASA Procurement Customer Survey is used to determine whether NASA's Procurement Offices are providing an acceptable level of service to the business/educational community, and if not, which areas need improvement. Respondents will be business concerns and educational institutions that have been awarded a NASA procurement, or are interested in receiving such an award.

II. Method of Collection

NASA uses electronic methods to collect information from collection respondents.

III. Data

Title: NASA Procurement Customer Survey.

OMB Number: 2700–0101.

Type of review: Extension of a currently approved collection.

Affected Public: Business or other for-profit; Not-for-profit institutions.

Estimated Number of Respondents: 1,000.

Estimated Annual Responses: 500.

Estimated Time Per Response: 15 minutes.

Estimated Total Annual Burden Hours: 125.

Estimated Total Annual Cost: $0.

Estimated Total Annual Cost: $0.00.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Walter Kit,

NASA Clearance Officer.

[FR Doc. E9–15 Filed 1–6–09; 8:45 am]

BILLING CODE 7510–13–P

NUCLEAR REGULATORY COMMISSION

Notice of Issuance of Regulatory Guide

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Issuance and Availability of Regulatory Guide 3.25, Revision 1.

FOR FURTHER INFORMATION CONTACT: Mark Orr, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–6373 or e-mail to *Mark.Orr@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is issuing a revision to an existing guide in the agency's ''Regulatory Guide'' series. This series was developed to describe and make available to the public information such as methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Regulatory Guide 3.25, ''Standard Format and Content of Safety Analysis Reports for Uranium Enrichment Facilities,'' was issued with a temporary identification as Draft Regulatory Guide, DG–3033. This regulatory guide directs the reader to the type of information acceptable to the NRC staff for review of a safety analysis report (SAR) for uranium enrichment facilities. The SAR may be a separate report submitted as part of the application or may be integrated into the license application. This guide also refers the reader to documentation on the standard format and content of SARs and related documents submitted as part of an application to construct or modify and operate a nuclear fuel cycle facility. Title 10, Part 70, ''Domestic Licensing of Special Nuclear Material,'' Subpart H, ''Additional Requirements for Certain Licensees Authorized to Possess a Critical Mass of Special Nuclear

Material,'' of the *Code of Federal Regulations* (10 CFR Part 70, Subpart H) identifies risk-informed performance requirements and requires applicants to complete an integrated safety analysis (ISA) and submit an ISA summary and other information to the NRC for approval.

This regulatory guide endorses the standard format and content for SARs and ISA summaries described in the current version of NUREG–1520, ''Standard Review Plan for the Review of a License Application for a Fuel Cycle Facility,'' as a process that the NRC staff finds acceptable for meeting the regulatory requirements.

II. Further Information

In May 2008, DG–3033 was published with a public comment period of 60 days from the issuance of the guide. The public comment period closed on July 25, 2008. The staff's responses to the public comments are located in the NRC's Agencywide Documents Access and Management System (ADAMS), Accession Number ML082690576. Electronic copies of Regulatory Guide 3.25, Revision 1 are available through the NRC's public Web site under ''Regulatory Guides'' at *http://www.nrc.gov/reading-rm/doc-collections/.*

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR), which is located at Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852–2738. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4209, by fax at (301) 415–3548, and by e-mail to *pdr.resource@nrc.gov.*

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

Dated at Rockville, Maryland, this 29th day of December 2008.

For the Nuclear Regulatory Commission.

Mark P. Orr,

Acting Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. E8–31423 Filed 1–6–09; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59187; File No. 4–533]

Joint Industry Plan; Notice of Filing and Immediate Effectiveness of Amendment to the National Market System Plan for the Selection and Reservation of Securities Symbols To Add NASDAQ OMX BX, Inc., as a Party Thereto

December 30, 2008.

Pursuant to Section 11A(a)(3) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 608 thereunder,[2] notice is hereby given that on December 24, 2008, NASDAQ OMX BX, Inc., (''BSE'') filed with the Securities and Exchange Commission (''Commission'') an amendment to the National Market System Plan for the Selection and Reservation of Securities Symbols (''Symbology Plan'' or ''Plan'').[3] The amendment proposes to add BSE as a party to the Symbology Plan. The Commission is publishing this notice to solicit comments on the proposed amendment from interested persons.

I. Description and Purpose of the Amendment

The current parties to the Symbology Plan are Chicago Board Options Exchange, Incorporated (''CBOE''), CHX, FINRA, the International Securities Exchange, LLC (''ISE''), Nasdaq, New York Stock Exchange LLC (''NYSE''), NYSE Arca, Inc. (''NYSE Arca''), NYSE Alternext U.S. LLC (''NYSE Alternext''), NSX and Phlx.[4] The proposed amendment to the Symbology Plan would add BSE as a party to the Symbology Plan. A self-regulatory organization (''SRO'') may become a party to the Symbology Plan if it satisfies the requirements of Section I(c) of the Plan. Specifically, an SRO may become a party to the Symbology Plan if: (i) It maintains a market for the listing or trading of Plan Securities[5] in accordance with rules approved by the Commission, which securities are identified by one, two, or three character symbols, on the one hand, or four or five character symbols, on the other hand, in each case prior to any suffix or special conditional identifier; (ii) it signs a current copy of the Plan; and (iii) it pays to the other parties a proportionate share of the aggregate development costs, based upon the number of symbols reserved by the new party during the first twelve (12) months of such party's membership.[6]

BSE has submitted a signed copy of the Symbology Plan to the Commission in accordance with the requirement set forth in the Symbology Plan regarding new parties to the plan.

II. Effectiveness of the Proposed Symbology Plan Amendment

The foregoing proposed Symbology Plan amendment has become effective pursuant to Rule 608(b)(3)(iii)[7] because it involves solely technical or ministerial matters. At any time within 60 days of the filing of the amendment, the Commission may summarily abrogate the amendment and require that it be refiled pursuant to paragraph (b)(1) of Rule 608,[8] if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the amendment is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml);* or

[1] 15 U.S.C. 78k–1(a)(3).

[2] 17 CFR 242.608.

[3] On November 6, 2008, the Commission approved the Symbology Plan that was originally proposed by the Chicago Stock Exchange, Inc. (''CHX''), The Nasdaq Stock Market, Inc. (''Nasdaq''), National Association of Securities Dealers, Inc. (''NASD'') (n/k/a Financial Industry Regulatory Authority, Inc. (''FINRA'')), National Stock Exchange, Inc. (''NSX''), and Philadelphia Stock Exchange, Inc. (''Phlx''), subject to certain changes. *See* Securities Exchange Act Release No. 58904, 73 FR 67218 (November 13, 2008) (File No. 4–533).

[4] On November 18, 2008, ISE filed with the Commission an amendment to the Plan to add ISE as a member to the Plan. *See* Securities and Exchange Act Release No. 59024 (November 26, 2008) 73 FR 74538 (December 8, 2008) (File No. 4–533).

On December 22, 2008, NYSE, NYSE Arca, and NYSE Alternext (''NYSE Group Exchanges'') and CBOE filed with the Commission amendments to the Plan to add the NYSE Group Exchanges and CBOE as members to the Plan. *See* Securities Exchange Act Release No. 59162 (December 24, 2008) (File No. 4–533).

[5] ''Plan Securities'' are defined in the Symbology Plan as securities that: (i) Are NMS securities as currently defined in Rule 600(a)(46) under the Act; and (ii) any other equity securities quoted, traded and/or trade reported through an SRO facility.

[6] Sections I(c) and IV(a) of the Plan.

[7] 17 CFR 242.608(b)(3)(iii).

[8] 17 CFR 242.608(b)(1).

• Send an e-mail to *rule-comments@sec.gov.* Please include File Number 4–533 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number 4–533. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number 4–533 and should be submitted on or before January 28, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E9–11 Filed 1–6–09; 8:45 am]

BILLING CODE 8011–01–P

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59182; File No. SR–CBOE–2008–130]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Options Regulatory Fee

December 30, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 24, 2008, the Chicago Board Options Exchange, Incorporated (''CBOE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to amend its Fees Schedule relating to the Options Regulatory Fee. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CBOE has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

The Exchange recently filed a proposed rule change with the Commission to eliminate Registered Representative Fees and establish a transaction-based ''Options Regulatory Fee'' (''ORF'').[3] Effective January 1, 2009, the Exchange would assess $.0045 per contract to each member for all options transactions executed by the member that are cleared by The Options Clearing Corporation (''OCC'') in the customer range (*i.e.*, that clear in a customer account at OCC), excluding Options Intermarket Linkage Plan (''Linkage'') orders. The ORF would be imposed upon all such transactions executed by a member, even if such transactions do not take place on the Exchange. The ORF would be collected indirectly from members through their clearing firms by OCC on behalf of the Exchange.

The Exchange proposes to waive the fee until February 1, 2009. The purpose for the fee waiver is to allow additional time for the Exchange and OCC to implement the procedures to be used by OCC to bill and collect the ORF.

(b) Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (''Act'')[4] [sic], in general, and furthers the objectives of Section 6(b)(4)[5] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Exchange believes it is appropriate to waive the ORF pending the implementation of the billing and collection procedures for the ORF.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 58817 (October 20, 2008), 73 FR 63744 (October 27, 2008). The ORF is designed to recover a portion of the costs to the Exchange of the supervision and regulation of its members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and subparagraph (f)(2) of Rule 19b–4[7] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2008–130 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2008–130. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the self-regulatory organization. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2008–130 and should be submitted on or before January 28, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E9–7 Filed 1–6–09; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59189; File No. SR–FINRA–2007–021]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to Amendments to the Code of Arbitration Procedure for Customer Disputes and the Code of Arbitration Procedure for Industry Disputes To Address Motions To Dismiss and To Amend the Eligibility Rule Related to Dismissals

December 31, 2008.

I. Introduction

The Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') on November 2, 2007, and amended on February 13, 2008 (Amendment No. 1), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change relating to amendments to the Code of Arbitration Procedure for Customer Disputes (''Customer Code'') and the Code of Arbitration Procedure for Industry Disputes (''Industry Code,'' and together with the Customer Code, the ''Codes'') to address motions to dismiss and to amend the eligibility rule related to dismissals. The proposed rule change was published for comment in the **Federal Register** on March 20, 2008.[3] The Commission received 119 comments in response to the proposed rule change.[4] This order approves the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57497 (March 14, 2008), 73 FR 15019 (March 20, 2008) (SR–FINRA–2007–021) (notice).

[4] *See* Joseph C. Korsak, Esq., dated November 4, 2007 (''Korsak Letter''); Will Struyk, dated December 10, 2007 (''Struyk Letter''); Michael Thurman, Esq., Loeb & Loeb LLP, dated February 29, 2008 (''Thurman Letter''); Prof. Seth E. Lipner, Esq., Baruch College dated March 18, 2008 (''Lipner Letter''); Leonard Steiner, Esq., dated March 18, 2008 (''Steiner Letter''); Laurence S. Schultz, Esq., Public Investors Arbitration Bar Association, dated March 18, 2008 (''PIABA Letter''); Steven J. Gard, Esq., Gard Law Firm, dated March 20, 2008 (''Gard Letter''); Steven B. Caruso, Esq., Maddox Hargett Caruso, P.C., dated March 20, 2008 (''Caruso Letter''); Philip M. Aidikoff, Esq., dated March 21, 2008 (''Aidikoff Letter''); Charles W. Austin, Jr., Esq., dated March 21, 2008 (''Austin Letter''); Gail E. Boliver, dated March 22, 2008 (''Boliver Letter''); Steve A. Buchwalter, Esq., dated March 23, 2008 (''Buchwalter Letter''); Ryan K. Bakhtiari, Esq., Uhl and Bakhtiari, dated March 24, 2008 (''Bakhtiari Letter''); Mark E. Maddox, Esq., Maddox Hargett Caruso, P.C., dated March 24, 2008 (''Maddox Letter''); Robert W. Goehring, Esq., dated March 24, 2008 (''Goehring Letter''); John J. Miller, Esq., Swanson Midgley, LLC, dated March 24, 2008 (''Miller Letter''); Richard A. Lewins, dated March 24, 2008 (''Lewins Letter''); Howard Rosenfield, Esq., dated March 24, 2008 (''Rosenfield Letter''); Sam Edwards, Esq., dated March 24, 2008 (''Edwards Letter''); Noah H. Simpson, Esq., Simpson Woolley, LLP, dated March 24, 2008 (''Simpson Letter''); Robert A. Uhl, Esq., March 25, 2008 (''Uhl Letter''); David Harrison, Esq., dated March 26, 2008 (''Harrison Letter''); Jeffrey Sonn, Esq., Sonn Erez, PLC, dated March 26, 2008 (''Sonn Letter''); Brian N. Smiley, Esq., Smiley Bishop Porter LLP, dated March 26, 2008 (''Smiley Letter''); Thomas A. Hargett, Esq., dated March 27, 2008, (''Hargett Letter''); Jay Salamon, Esq., Hermann, Cahn and Schneider LLP, dated March 27, 2008 (''Salamon Letter''); J. Pat Sadler, Esq., dated March 31, 2008 (''Sadler Letter''); Keith L. Griffin, Esq., Maddox Hargett Caruso, P.C., dated April 1, 2008 (''Griffin Letter''); Scott R. Shewan, Esq., Born, Pape & Shewan LLP, dated April 1, 2008 (''Shewan Letter''); Alan S. Brodherson, Esq., dated April 3, 2008 (''Brodherson Letter''); W. Scott Greco, Esq., Greco & Greco, P.C., dated April 3, 2008 (''Greco Letter''); David P. Neuman, Esq., Stoltmann Law Offices, P.C., dated April 4, 2008 (''Neuman Letter''); Edward G. Turan and Martha E. Solinger, Securities Industry and Financial Markets Association, dated April 7, 2008 (''SIFMA Letter''); Curt H. Mueller, Esq., Schwab & Co., Inc., dated April 7, 2008 (''Schwab Letter''); Erin Linehan, Esq., Raymond James Financial, Inc., dated April 8, 2008 (''Raymond James Letter''); Barry D. Estell, Esq., dated April 8, 2008 (''Estell Letter''); Robert C. Port, Esq., dated April 8, 2008 (''Port Letter''); Jonathan W. Evans, Esq., dated April 8, 2008 (''Evans Letter''); Kevin A. Carreno, dated April 8, 2008 (''Carreno Letter''); Vincent J. Imbesi, Esq., The Avelino Law Firm, dated April 9, 2008 (''Imbesi Letter''); John E. Lawlor, Esq., dated April 9, 2008 (''Lawlor Letter''); Jonathan Schwartz, Esq., dated April 9, 2008 (''Schwartz Letter''); Andrew Dale Ledbetter, dated April 9, 2008 (''Ledbetter Letter''); Theodore A. Krebsbach, Esq., Krebsbach & Snyder, dated April 9, 2008 (''Krebsbach Letter''); Raymond W. Henney, Esq., Honigman Miller Schwartz and Cohn LLP, dated April 9, 2008 (''Henney Letter''); Randall R. Heiner, Esq., dated April 9, 2008 (''Heiner Letter''); Inge Selden III, Esq., Maynard Cooper & Gale PC, dated April 9, 2008 (''Selden Letter''); Eric G. Wallis, Esq., Reed Smith LLP, dated April 9, 2008 (''Wallis Letter''); Robert H. Rex, Esq., Continued

Dickenson Murphy Rex and Sloan, dated April 9, 2008 (''Rex Letter''); Bradley R. Stark, Esq., Florida International University, dated April 9, 2008 (''Stark Letter''); Robert N. Rapp, Esq., Calfee, Halter Griswold LLP, dated April 9, 2008 (''Rapp Letter''); Richard J. Babnick, Esq., Sichenzia Ross Friedman Ference LLP, dated April 9, 2008 (''Babnick Letter''); Joseph F. Myers, Esq., dated April 9, 2008 (''Myers Letter''); Anne T. Cooney, Esq., Morgan Stanley, dated April 9, 2008 (''Morgan Stanley Letter''); Jonathan Kord Lagemann, Esq., dated April 9, 2008 (''Lagemann Letter''); Frederick S. Schrils, Esq., GrayRobinson, dated April 9, 2008 (''Schrils Letter''); Andrew Stoltmann, Esq., dated April 9, 2008 (''Stoltmann Letter''); Richard M. Layne, Esq., dated April 9, 2008 (''Layne Letter''); Herb Pounds, Jr., Esq., dated April 9, 2008 (''Pounds Letter''); Alan F. Hartman, CLU, ChFC, dated April 9, 2008 (''Hartman Letter''); Brian F. Amery, Esq., Bressler, Amery Ross, P.C., dated April 9, 2008 (''Amery Letter''); Michael G. Shannon, Esq., Thelen Reid Brown Raysman & Steiner LLP, dated April 9, 2008 (''Shannon Letter''); Carl J. Carlson, Esq., Carlson & Dennett, P.S., dated April 9, 2008 (''Carlson Letter''); Matthew Farley, Esq., Drinker Biddle & Reath LLP, dated April 9, 2008 (''Farley Letter''); Joel E. Davidson, Esq., Davidson & Grannum, LLP, dated April 9, 2008 (''Davidson Letter''); Al Van Kampen, Esq., dated April 10, 2008 (''Van Kampen Letter''); Theodore M. Davis, Esq., dated April 10, 2008 (''Davis Letter''); Lawrence R. Gelber, Esq., dated April 10, 2008 (''Gelber Letter''); Pearl Zuchlewski, Esq., Kraus Zuchlewski LLP, dated April 10, 2008 (''Zuchlewski Letter''); Rob Bleecher, Esq., dated April 10, 2008 (''Bleecher Letter''); Thomas C. Wagner, Esq., dated April 10, 2008 (''Wagner Letter''); John V. McDermott, Esq., Holme Roberts Owen LLP, dated April 10, 2008 (''McDermott Letter''); Peter J. Mougey, Esq., Beggs & Lane, dated April 10, 2008 (''Mougey Letter''); Christopher Gibbons/Lisa A. Catalano, Securities Arbitration Clinic, St. John's University Law School, dated April 10, 2008 (''St. John's Letter''); John W. Shaw, Esq., Berkowitz, Oliver, Williams, Shaw Eisenbrandt, dated April 10, 2008 (''Shaw Letter''); Audrey Venezia, Esq., dated April 10, 2008 (''Venezia Letter''); H. Nicholas Berberian, Esq., Gerber & Eisenberg LLP, dated April 10, 2008 (''Berberian Letter''); Michael N. Ungar, Esq., and Kenneth A. Bravo, Esq., Ulmer & Berne LLP, dated April 10, 2008 (''Ungar/Bravo Letter''); Jody Forchheimer, Esq., Fidelity Investments, dated April 10, 2008 (''Forchheimer Letter''); Jill I. Gross, Barbara Black and Teresa Milano, dated April 10, 2008 (''Gross/Black Letter''); Michael Weissmann, Esq., Bingham McCutchen LLP, dated April 10, 2008 (''Weissmann Letter''); Thomas P. Willcutts, Esq., Willcutts Law Group, LLC, dated April 10, 2008 (''Willcutts Letter''); Mark A. Tepper, Esq., Mark A. Tepper, P.A., dated April 10, 2008 (''Tepper Letter''); Joe Soraghan, Principal, Danna McKitrick, P.C., dated April 10, 2008 (''Soraghan Letter''); Bryan T. Forman, Esq., dated April 10, 2008 (''Forman Letter''); Rodney Acker, Esq., Fulbright & Jaworski LLP, dated April 10, 2008 (''Acker Letter''); Birgitta Siegel, Esq., Securities Arbitration & Consumer Law Clinic, Syracuse University, dated April 10, 2008 (''Syracuse Letter''); Brett A. Rogers and Jill E. Steinberg, Esq., Rogers & Hardin, dated April 10, 2008 (''Rogers/Steinberg Letter''); Jeffrey Kruske, Esq., dated April 10, 2008 (''Kruske Letter''); John Taft, RBC Wealth Management, dated April 10, 2008 (''RBC Letter''); Thomas V. Dulcich, Esq., Schwabe, Williamson & Wyatt, dated April 10, 2008 (''Dulcich Letter''); Harry T. Walters, Esq., Citigroup, dated April 10, 2008 (''Citigroup Letter''); Craig Gordon, RBC Correspondent Services, dated April 10, 2008 (''Gordon Letter''); William A. Jacobson, Esq., Cornell Securities Law Clinic, dated April 10, 2008 (''Cornell Letter''); Bradford D. Kaufman, Greenberg, Taurig, P.A., dated April 10, 2008 (''Kaufman Letter''); Tim Canning, Esq., Law Offices of Timothy A. Canning, dated April 10, 2008 (''Canning Letter''); Peter R. Boutin, Esq., Keesal, Young & Logan, dated April 10, 2008 (''Boutin Letter''); Christian T. Kemnitz, Esq., Katten Muchin Rosenman, dated April 10, 2008 (''Kemnitz Letter''); Scot Bernstein, Esq, dated April 10, 2008 (''Bernstein Letter''); John S. Burke, Esq., Higgins Burke, P.C., dated April 10, 2008 (''Burke Letter''); Dayton P. Haigney, Esq., dated April 10, 2008 (''Haigney Letter''); Robert J. Anello, Esq., Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C., dated April 10, 2008 (''Anello Letter''); Brad S. Karp, Esq., Paul, Weiss, Rifkind, Wharton & Garrison LLP, dated April 10, 2008 (''Karp Letter''); Andrew L. Weinberg, Esq., Deutsche Bank Securities Inc., dated April 10, 2008 (''DBSI Letter''); Harry A. Jacobowitz, Esq., Securities Arbitration Commentator, dated April 10, 2008 (''Jacobowitz Letter''); Jenice L. Malecki, Esq., Malecki Law, dated April 10, 2008 (''Malecki Letter''); Stephen Krosschell, Esq., dated April 10, 2008 (''Krosschell Letter''); Abe Lampart, Esq., Offices of Abe Lampart, dated April 10, 2008 (''Lampart Letter''); Mark J. Astarita, Esq., dated April 10, 2008 (''Astarita Letter''); Robert S. Banks, Esq., Banks Law Offices, dated April 10, 2008 (''Banks Letter''); Debra G. Speyer, Esq., dated April 10, 2008 (''Speyer Letter''); Joseph Fogel, Sherman Oaks, CA (''Fogel Letter''); Harry J. Buckman, Jr., dated April 11, 2008 (''Buckman Letter''); Jan Graham, Esq., dated April 11, 2008 (''Graham Letter''); Patricia Cowart, Esq., Wachovia Securities, LLC, dated April 11, 2008 (''Wachovia Letter''); Stuart D. Meissner, Esq., dated April 12, 2008 (''Meissner Letter''); Debra B. Hayes, Esq., dated April 15, 2008 (''Hayes Letter''); William P. Torngren, Esq., dated April 16, 2008 (''Torngren Letter''); Laurence S. Schultz, Public Investors Arbitration Bar Association, dated April 25, 2008 (''PIABA 2 Letter'').

proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change

FINRA [5] proposed to provide specific procedures to govern motions to dismiss, and to amend the provision of the eligibility rule related to dismissals. The proposal is designed to ensure that parties would have their claims heard in arbitration, by significantly limiting the grounds for filing motions to dismiss prior to the conclusion of a party's case in chief and by imposing stringent sanctions against parties for engaging in abusive practices under the rule.

Background

The Code of Arbitration Procedure that was in use prior to April 16, 2007, did not address motions practice.[6] Because motions were becoming increasingly common in arbitration, FINRA proposed to include in its revision of the entire Code of Arbitration Procedure (''Code Revision'') some guidance for parties and arbitrators with respect to motions practice.

The Code Revision, as initially filed with the SEC in 2003, contained a rule that would have permitted a panel to grant a motion to decide claims before a hearing on the merits (a ''dispositive motion'') only under extraordinary circumstances. FINRA proposed this rule in an attempt to address concerns raised by investors' counsel, SEC staff and other constituent groups about abusive and duplicative filing of dispositive motions. Specifically, FINRA received complaints that parties (typically respondent [7] firms) were filing dispositive motions routinely and repetitively in an apparent effort to delay scheduled hearing sessions on the merits, increase investors' costs (typically claimants [8]), and intimidate less sophisticated parties.[9] In some cases, if a party did not receive a favorable ruling on a dispositive motion filed at a particular stage in an arbitration proceeding, that party would re-file the same or a similar dispositive motion at a later time, which often served only to increase investors' costs and delay the hearing and the issuance of any award. Moreover, FINRA learned through various constituent and focus groups that some respondents' attorneys were being counseled by their law firms that an acceptable and useful tactic was to file multiple dispositive motions at various stages of an arbitration proceeding.

When the Code Revision was published for comment in the **Federal Register**, commenters opposed the dispositive motions rule for a variety of reasons. Therefore, FINRA removed the rule from the Code Revision and re-filed it separately.[10] The SEC then approved the Code Revision without the dispositive motions rule.[11]

Prior Dispositive Motions Proposal

As re-filed with the SEC, the dispositive motions proposal would

[5] Although some of the events referenced in this rule filing occurred prior to the formation of FINRA through consolidation of NASD and the member regulatory functions of NYSE Regulation, the rule filing refers to FINRA throughout for simplicity.

[6] The Codes became effective on April 16, 2007, for claims filed on or after that date; the old Code continues to apply to pending cases until their conclusion.

[7] A respondent is a party against whom a statement of claim or third party claim has been filed.

[8] A claimant is a party that files the statement of claim and other documents that initiate an arbitration.

[9] For example, the Securities Arbitration Commentator published a study in Fall 2006 on motions to dismiss in customer cases, which concludes that, in the universe of cases that went to award, there were motions to dismiss in 28% of the cases in 2006 as compared to 10% in 2004. *Securities Arbitration Commentator*, Nov. 2006 (Vol. 2006, No. 5), at 3.

[10] *See* Securities Exchange Act Release No. 54360 (August 24, 2006), 71 FR 51879 (August 31, 2006) (SR–NASD–2006–088) (notice).

[11] *See* Securities Exchange Act Release No. 55158 (January 24, 2007), 72 FR 4574 (January 31, 2007) (SR–NASD–2003–158 and SR–NASD–2004–011) (approval order).

have permitted a panel to grant a dispositive motion prior to an evidentiary hearing only under extraordinary circumstances.[12] The SEC published the proposal for public comment on August 31, 2006, and received over 60 comment letters,[13] the majority of which opposed the proposal.

Based on the comments, FINRA recognized that the proposal did not provide effective guidance on how dispositive motions would be handled in the forum. Because the comments indicated that various issues involving dispositive motions required more guidance, FINRA withdrew the dispositive motions proposal, and filed a new proposed rule change to provide specific procedures that would govern motions to dismiss. In its new proposed rule change, FINRA also proposed to amend the separate rule governing dismissals made on eligibility grounds.

Motions To Dismiss on Other Than Eligibility Grounds

FINRA filed the proposed rule change to provide specific procedures that would govern motions to dismiss. Generally, FINRA stated that it believes that parties have the right to a hearing in arbitration. In certain very limited circumstances, however, FINRA indicated that it would be unfair to require a party to proceed to a hearing. The proposal is designed to balance these competing interests. In FINRA's view, the proposal should ensure that parties [14] have their claims heard in arbitration, by significantly limiting the grounds for filing motions to dismiss prior to conclusion of a party's case in chief and by imposing stringent sanctions against parties for engaging in abusive practices under the rule. The proposal would permit parties to file a motion to dismiss at the conclusion of a party's case in chief, based on any theory of law.

The proposed rule change would govern motions to dismiss filed prior to the conclusion of a party's case in chief (under the Customer Code or Industry Code, as applicable), as discussed in further detail below.

Discourage Motions To Dismiss a Claim Prior to Conclusion of a Party's Case in Chief

The proposal would clarify that motions to dismiss a claim prior to the conclusion of a party's case in chief are discouraged in arbitration. FINRA stated that it believes that parties have the right to a hearing in arbitration, and only in certain very limited circumstances should that right be challenged. This policy statement would not apply to motions filed on the basis of eligibility grounds, as discussed below.

Require That Motions To Dismiss Be Filed in Writing, Separately From the Answer, and After the Answer Is Filed

FINRA stated that it believes that requiring a party to file a motion to dismiss in writing separately from the answer and only after the answer is filed would deter parties from filing these motions routinely in lieu of an answer, and would prevent parties from combining a motion to dismiss with an answer. This provision should ensure that parties receive an answer that responds directly to the statement of claim.

Filing Deadlines

The proposed rule change would require parties to serve motions under this provision at least 60 days before a scheduled hearing and would provide 45 days to respond to a motion unless the parties agree or the panel determines otherwise. FINRA stated that it believes that requiring a motion to dismiss to be served at least 60 days before a scheduled hearing and providing 45 days for a party to respond to such a motion would prevent the moving party from filing a motion shortly before a hearing as a surprise tactic to force a delay in the arbitration process.

Require the Full Panel To Decide Motions To Dismiss

The proposal would require the full panel to decide motions to dismiss. Given the ramifications of granting a motion to dismiss, FINRA stated that it believes that each member of the panel should be required to hear the parties' arguments, so that each panel member may make an informed decision when ruling on the motion.

Require an Evidentiary Hearing

Under the proposal, the panel would not be permitted to grant a motion to dismiss prior to the conclusion of a party's case in chief unless the panel holds an in-person or telephonic prehearing conference on the motion that is recorded in accordance with Rule 12606 of the Customer Code or Rule 13206 of the Industry Code, unless such conference is waived by the parties. FINRA stated that it believes this requirement would ensure that the panel holds a hearing on the motion and that the panel has sufficient information to make a ruling.

Limited Grounds on Which a Motion May Be Granted

FINRA proposed to limit the grounds on which a panel may act upon a motion to dismiss prior to the conclusion of the party's case in chief. The proposal states that a panel may act upon a motion to dismiss only after the party rests its case in chief unless the panel determines that:

- The non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release; or
- The moving party was not associated with the account(s), security(ies), or conduct at issue.[15]

FINRA stated that it believes that limiting the grounds on which a motion to dismiss may be granted prior to the conclusion of the party's case in chief would minimize the potential for abusive practices and ensure that most parties' claims would be heard in the forum.

Require a Unanimous, Explained, Written Decision To Grant a Motion To Dismiss

The proposal would require a unanimous decision by the panel to grant a motion to dismiss as well as a written explanation of the decision in the award. Under the proposal, each member of the panel must agree to grant a motion to dismiss. FINRA stated that it believes that because these decisions are an integral part of the arbitration process, all panel members should agree to dismiss a claim; otherwise the case should continue. Moreover, the provision that requires the panel to provide a written explanation of its decision would help parties understand the panel's rationale for its decision.

Require Permission From the Arbitrators To Re-File a Denied Motion To Dismiss

Under the proposal, a party would be prohibited from re-filing a denied motion to dismiss, unless specifically permitted by a panel order. FINRA stated that it believes this limitation would serve to expedite the arbitration process and minimize parties' costs.

[12] *See* note 10, *supra*.

[13] *See* Comments on File No. SR–NASD–2006–088, Notice of Filing of Proposed Rule Change Relating to Motions To Decide Claims Before a Hearing on the Merits, *available at http://www.sec.gov/comments/sr–nasd–2006–088/nasd2006088.shtml* (last visited December 5, 2008).

[14] For purposes of the proposal, a party could be an initial claimant, respondent, counterclaimant, cross claimant, or third party claimant and his or her motion to dismiss would be subject to Rules 12206 and 12504 of the Customer Code or Rules 13206 and 13504 of the Industry Code.

[15] A motion to dismiss on eligibility grounds would be governed by Rules 12206 and 13206 of the Customer and Industry Code, respectively; the amendments to those rules are discussed below.

Require Arbitrators To Award Fees Associated With Denied Motions To Dismiss and To Award Fees and Costs Associated With Frivolously Filed Motions To Dismiss

The proposal would also require that the panel assess forum fees associated with hearings on the motion to dismiss against the party filing the motion to dismiss, if the panel denies the motion. Further, if the panel deems frivolous a motion filed under this rule, the panel must award reasonable costs and attorneys' fees to a party that opposed the motion. FINRA stated that it believes that imposing monetary penalties would minimize abusive practices involving motions to dismiss and would deter parties from filing such motions frivolously.

Permit Sanctions for Motion To Dismiss Filed in Bad Faith

If the panel determines that a party filed a motion under this rule in bad faith, the panel also may issue sanctions under Rule 12212 of the Customer Code or Rule 13212 of the Industry Code. FINRA stated that it believes that these stringent sanction requirements would provide panels with additional enforcement mechanisms to address abusive practices involving motions to dismiss if other deterrents prove ineffective.

When a moving party (governed by the Customer Code or Industry Code, as applicable) files a motion to dismiss at the conclusion of a party's case in chief, the provisions governing motions to dismiss filed prior to the conclusion of a party's case in chief discussed above would not apply. Thus, a moving party could file a motion to dismiss at the conclusion of a party's case in chief, based on any theory of law. The rule, however, would not preclude the panel under this scenario from issuing an explanation of its decision if it grants the motion, or awarding costs or fees to the party that opposed the motion if it denies the motion.

FINRA stated that it believes that permitting a moving party to file a motion to dismiss at the conclusion of a party's case in chief should balance the goal of ensuring that non-moving parties have their claims heard by a panel against the rights of moving parties to challenge a claim they believe lacks merit or has not been proved. Moreover, FINRA stated that it believes that arbitrators should be permitted to entertain and act upon a motion to dismiss at this stage of a hearing to minimize the moving parties' incurring unnecessary additional attorneys' fees and forum fees. If a claimant has presented its case in chief and clearly failed to present sufficient evidence to support a claim, then the moving party should not be forced to incur the additional expenses and costs associated with unnecessary hearings.

The proposal provides that motions to dismiss based on failure to comply with the code or an order of the panel under Rule 12212 of the Customer Code or 13212 of the Industry Code, as applicable, would be governed by that rule. Further, the proposal provides that motions to dismiss based on discovery abuse filed under Rule 12511 of the Customer Code or Rule 13511 of the Industry Code, as applicable, would be governed by that rule.

Amendments to the Dismissal Provision of the Eligibility Rule

FINRA proposed to amend Rules 12206(b) and 13206(b) of the Customer and Industry Codes, respectively, to address motions to dismiss made on eligibility grounds. Under this proposal, a party would be permitted to file a motion to dismiss on eligibility grounds at any stage of the proceeding (after the answer is filed), except that a party would not be permitted to file this motion any later than 90 days before the scheduled hearing on the merits. FINRA also proposed to amend the rule to address the res judicata defense claimants could encounter when they attempt to pursue in court a claim dismissed in arbitration, when the grounds for the dismissal are unclear.

First, FINRA proposed to amend Rules 12206(b) of the Customer Code and Rule 13206(b) of the Industry Code to establish procedures for motions to dismiss made on eligibility grounds. In light of the new motions to dismiss proposal, FINRA stated that it believes that similar changes should be incorporated into the existing eligibility rule to provide procedures and guidance for dealing with motions to dismiss made on eligibility grounds. The proposed changes to the eligibility rule contain most of the same provisions as those contained in the proposed motions to dismiss rule (discussed above), except for those criteria that are not applicable to eligibility motions, that is, the two other grounds on which a panel may grant a motion to dismiss before a party has presented its case in chief (*i.e.*, signed settlement and written release and factual impossibility).

In addition, the filing deadlines would be different from those in the motions to dismiss proposal. Under the proposed rule, a party would be permitted to file a motion to dismiss on eligibility grounds at any stage of the proceeding (after the answer is filed), except that a party would not be permitted to file this motion any later than 90 days before the scheduled hearing on the merits. FINRA stated that it believes that this requirement would encourage moving parties to determine in the early stages of the case whether to pursue their claims in court or to proceed with the arbitration. Further, FINRA stated that this requirement would prevent the moving party from filing this motion shortly before a hearing as a surprise tactic to force a delay in the arbitration process.

The proposal also would provide parties with 30 days to respond to an eligibility motion. If a panel grants a motion to dismiss a party's claim based on eligibility grounds, that party must re-file the claim in court to pursue its remedies, which could further delay resolution of the dispute. Therefore, FINRA proposed the 30-day timeframe to respond to eligibility motions to expedite the process, so that the time between filing a claim and resolution of the dispute is shortened.

Second, FINRA addressed potential problems in the implementation of the eligibility rule since it was last amended in 2005. Currently, the eligibility rule makes clear that dismissal of a claim on eligibility grounds in arbitration does not preclude a party from pursuing the claim in court; it provides that, by requesting dismissal of a claim under the rule, the requesting party is agreeing that the non-moving party may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.[16]

In certain situations, when a claim is dismissed under the eligibility rule, FINRA understands that claimants have had difficulty proceeding with their claims in court, because respondents have asserted a res judicata defense when the panel's grounds for dismissing the arbitration claim were unclear. For example, if a respondent files a motion to dismiss based on several grounds, including eligibility, and the panel issues an order dismissing a claim, but without citing reasons, the claimants would not know whether or not they are afforded the right to pursue the claim in court, as provided by the rule. If the claimants proceed to file the dismissed claim in court, the respondents may argue that the panel's decision on the claim is the final decision, and that claimants are barred from having the court decide the same claim again. In such a case, claimants would be required to prove that the dismissal was based on eligibility, not the other

[16] Rule 12206(b) of the Customer Code and Rule 13206(b) of the Industry Code.

grounds for dismissal that the respondents raised. This would be difficult or impossible if the arbitrator or panel did not explain the reasons for the dismissal.

FINRA proposed to amend the eligibility rule to address this issue. As amended, the rule would provide that when a party files a motion to dismiss on multiple grounds, including eligibility, the panel must consider the threshold issue of eligibility first. First, the rule would be amended to require that if the panel grants the motion to dismiss on eligibility grounds on all claims, it shall not rule on any other grounds for the motion to dismiss. Second, the rule would be amended to require that if the panel grants the motion to dismiss on eligibility grounds, on some, but not all claims, and the non-moving party elects to move the case to court, the panel shall not rule on any other ground for dismissal for 15 days from the date of service of the panel's decision to grant the motion to dismiss on eligibility grounds. Third, the rule would be amended to require that, when arbitrators dismiss any claim on eligibility grounds, that fact must be stated on the face of their order and any subsequent award the panel may issue. And fourth, the rule would provide that if the panel denies the motion to dismiss on the basis of eligibility, it shall rule on the other bases for the motion to dismiss the remaining claims in accordance with the motions to dismiss rule. FINRA stated that it believes that the proposed amendments will close a loophole that has resulted from implementing the rule by eliminating the res judicata defense that claimants could face when they attempt to pursue claims in court that were dismissed in arbitration on eligibility grounds.

III. Comment Letters

The Commission received 119 comments relating to FINRA–2007–021 concerning amendments to arbitration procedures for pre-hearing motions to dismiss and dismissals on eligibility grounds. The Commission also received FINRA's response to comments, which is discussed below.[17] Of the 119 letters: (i) Sixteen commenters [18] (consisting of professors and attorneys representing investors) opposed the proposed rule change on the basis that it does not go far enough to end the abuse in motions to dismiss, (ii) forty-four commenters [19] (consisting of SIFMA, broker-dealers and attorneys representing the financial industry) opposed the rule principally because of the narrow scope of the grounds for filing pre-hearing motions to dismiss; (iii) two commenters [20] (an attorney representing investors and a professor of finance) opposed the proposed rule for other reasons; (iv) fifty-four commenters [21] (including PIABA,[22] attorneys representing investors, law school clinics and professors) supported the proposed rule; and (vi) three [23] commenters did not express a definitive view.

Of the 44 commenters that opposed the rule on the basis of the narrow scope of grounds for filing pre-hearing motions to dismiss, 15 commenters [24] expressed concern regarding many of the procedural rules in the proposal, 11 commenters [25] noted that they would support the procedural rules in the proposal, while the remaining 18 commenters did not state their views regarding the procedural rules. Of the 54 commenters who supported the proposal, two expressed unconditional support.[26] Many of the remaining supporters indicated that the proposal should be approved, but also that all motions to dismiss should be prohibited in FINRA's arbitration forum.[27]

Detailed Discussion of Comments and FINRA Response

Policy Statement on Prehearing Motions

Proposed Rules 12504(a)(1) of the Customer Code and 13504(a)(1) of the Industry Code would provide that motions to dismiss a claim prior to the conclusion of a party's case in chief are discouraged in arbitration. Many commenters addressed this statement of policy regarding motions to dismiss in FINRA's arbitration forum and, in particular, the use of the word ''discouraged.''

Several commenters supported the statement of policy, indicating that it sets an appropriate tone for the rest of the proposal.[28] One commenter contended that the rule language does not sufficiently discourage motions to dismiss and should indicate that motions to dismiss should be granted only in extraordinary circumstances.[29] One commenter who opposed the proposal contended that, without this language, the proposal would appear to authorize and encourage motions to dismiss in the forum.[30] A number of commenters opposed the policy statement, arguing that it unfairly discourages motions to dismiss prior to the conclusion of a party's case in chief in the forum, and creates an unnecessary bias against these motions.[31]

FINRA responded to these comments by stating that, generally, FINRA believes that parties have the right to a hearing in arbitration and that proposed Rules 12504(a)(1) of the Customer Code and 13504(a)(1) of the Industry Code would reinforce this position by clarifying that prehearing motions to dismiss are discouraged in arbitration. FINRA stated its belief that the word ''discouraged'' is appropriately placed in the rule language, and accurately describes its view of prehearing motions to dismiss in the forum.

FINRA also disagreed with those commenters who contended that this policy statement unfairly discourages all motions to dismiss in the forum. FINRA pointed out that, while the proposal limits the exceptions under which a prehearing motion to dismiss may be granted, proposed Rules 12504(b) of the Customer Code and 13504(b) of the Industry Code would permit parties to file a motion on any ground after the conclusion of a party's case in chief. FINRA indicated its belief that it would

[17] Letter from Mignon McLemore, FINRA, dated September 15, 2008 (''FINRA Letter'').

[18] Burke, Canning, Estell, Fogel, Gard, Krosschell, Lipner, Meissner, Port, Pounds, Rex, Simpson, Speyer, Steiner, Tepper and Willcutts Letters.

[19] Acker, Amery, Anello, Astarita, Babnick, Berberian, Brodherson, Boutin, Buckman, Carreno, Citigroup, Davidson, DBSI, Dulcich, Farley, Forchheimer, Gelber, Gordon, Hartman, Henney, Karp, Kaufman, Kemnitz, Krebsbach, Lampart, McDermott, Morgan Stanley, Rapp, Raymond James, RBC, Rogers/Steinberg, Schrils, Schwab, Selden, Shannon, Shaw, SIFMA, Soraghan, Thurman, Ungar/Bravo, Venezia, Wachovia, Wallis, and Weissman Letters.

[20] Schwartz and Stark Letters.

[21] Aidikoff, Austin, Banks, Bakhtiari, Bernstein, Bleecher, Boliver, Buchwalter, Carlson, Caruso, Cornell, Davis, Edwards, Evans, Forman, Graham, Griffin, Goehring, Greco, Gross/Black, Haigney, Hargett, Harrison, Hayes, Heiner, Korsak, Kruske, Imbesi, Lagemann, Lawlor, Layne, Ledbetter, Lewins, Maddox, Malecki, Miller, Mougey, Myers, Neuman, PIABA, PIABA 2, Sadler, Salamon, Shewan, Smiley, Sonn, St. John's, Stoltmann, Syracuse, Torngren, Uhl, Van Kampen, Wagner and Zuchlewski Letters.

[22] PIABA wrote two letters in support of the proposed rule.

[23] Jacobowitz, Rosenfield and Struyk Letters.

[24] Astarita, Berberian, Berne, Carreno, DBSI, Forchheimer, Gordon, Lampart, RBC, Selden, Shaw, SIFMA, Ungar/Bravo, Venezia and Wachovia Letters.

[25] Babnick, Berberian, Citigroup, Kaufman, Kemnitz, McDermott, Morgan Stanley, Raymond James, Rogers, Schrils, and Thurman Letters.

[26] Heiner and Korsak Letters.

[27] *See, e.g.*, Caruso, Kruske, Lewins, Shewan and St. John's Letters.

[28] *See, e.g.*, Carlson Letters, Lawlor and PIABA 2.

[29] Black/Gross Letter.

[30] Lipner Letter.

[31] *See, e.g.*, Forchheimer, SIFMA, Ungar/Bravo, and Wachovia Letters.

be unfair to require parties to incur additional hearing session fees if there is a valid reason to dismiss after the claimant's case. In those cases, FINRA suggested that a panel may grant a motion to dismiss, under proposed subparagraph (b), if the moving party proves such action is warranted.

FINRA emphasized that the proposed rules do not constitute an invitation to parties to file prehearing motions to dismiss. Further, FINRA noted that the fact that a motion may be filed under one of the exceptions in the proposal does not mean that the panel should or will grant the motion.

In a prior, withdrawn proposal, FINRA stated that motions to dismiss should be granted only in extraordinary circumstances.[32] Some commenters suggested that the absence of that language in the current proposal effectively authorizes or encourages motions to dismiss. FINRA indicated that it disagrees, and believes that the current proposal removes the ambiguity that the ''extraordinary circumstances'' concept created, and expressly outlines FINRA's position concerning motions to dismiss. FINRA reiterated that the current proposal would provide for three limited exceptions under which a motion to dismiss may be granted before the conclusion of a claimant's case-in-chief, thereby limiting the timing and circumstances under which such a prehearing motion may be filed. Moreover, FINRA pointed out that the proposal would require a panel to impose strict sanctions against parties who file motions to dismiss frivolously or in bad faith. Taken together, FINRA stated that these provisions reinforce its position that prehearing motions to dismiss in arbitration are discouraged and should be granted only under the limited exceptions of the rule. Accordingly, FINRA declined to amend the proposal to reintroduce the reference to ''extraordinary circumstances.''

Scope of Proposed Rules 12504(a)(6)(B) of the Customer Code and 13504(a)(6)(B) of the Industry Code (''Not Associated'' Exception)

Proposed Rules 12504(a)(6)(B) of the Customer Code and 13504(a)(6)(B) of the Industry Code would provide that a prehearing motion to dismiss may be granted prior to the conclusion of the claimant's case, if the respondent was not associated with the account, security, or conduct at issue.

Most commenters suggested that FINRA should clarify how proposed Rule 12504(a)(6)(B) of the Customer Code would be applied. Many commenters indicated their belief that the exception should be interpreted broadly, so that senior executives, branch managers, and other office personnel could be excluded under this provision.[33] Conversely, a number of commenters contended that a broad interpretation of the exception could wrongly exempt persons or entities not directly associated with transactions but who are liable under applicable statutes or case law (*e.g.*, supervisors in ''selling away'' [34] cases).[35]

FINRA responded to these comments by indicating that it intends this exception to apply narrowly, such as in cases involving issues of misidentification. Thus, under this exception, a prehearing motion to dismiss could be granted if, for example, a party files a claim against the wrong person or entity, or a claim names an individual who was not employed by the firm during the time of the dispute, or a claim names an individual or entity that had no control over or was not connected to an account, security or conduct at the firm during the time of the dispute. Under this interpretation, therefore, a panel would not grant a motion to dismiss filed under this exception in cases in which a respondent may be liable as a supervisor or control person under applicable statutes [36] or in ''selling away'' cases.[37]

One commenter sought clarification concerning whether this exception would exclude parties in a supervisory position, or under control person liability when a broker-dealer is defunct.[38]

FINRA stated that if the claim involves a respondent who is liable as a supervisor or control person and the cause of action arose before the firm became defunct, a motion to dismiss filed under this exception would be inappropriate. FINRA noted that under its By-Laws, an associated person continues to be subject to FINRA's jurisdiction if the conduct occurred while the person was associated or registered with a firm.[39] Moreover, FINRA pointed out that if a firm is defunct, a claimant may request default proceedings against the firm, provided certain criteria are met.[40]

Additional Exceptions for Permissible Prehearing Motions

Numerous commenters, who opposed the proposal, argued that the three exceptions to the general prohibition on prehearing motions to dismiss [41] are too narrow and fail to include certain situations in which such motions would be appropriate.[42] These commenters suggested that FINRA expand the proposed rule to include the following exceptions: Clearing brokers, senior executives, statutes of limitation, and legal impossibility exceptions, such as defamation for statements made on required forms (which some courts have held are protected by an absolute privilege) and the doctrine of res judicata.[43] Several of these commenters focused on the lack of an exception for clearing firms, arguing that, based on the nature of their operations, clearing firms do not owe a legal duty to claimants and, therefore, cannot be held liable for the wrongful acts of the introducing firm.[44]

A large portion of the commenters who supported the proposal contended that expanding the scope of prehearing motions to dismiss would negate the intent of the proposal and encourage unnecessary and unwarranted motions to dismiss.[45] Indeed, many of these commenters argued that the eligibility exception to the general prohibition on prehearing motions to dismiss should be removed because eligibility motions

[32] *See* note 10, *supra*.

[33] *See, e.g.*, Raymond James, Selden, Shannon and SIFMA Letters.

[34] A ''selling away'' claim involves a dispute in which an associated person is alleged to have engaged in securities activities outside his or her firm.

[35] *See, e.g.*, Banks, Greco, Krosschell, PIABA 2 and Shewan Letters.

[36] *See, e.g.*, Uniform Securities Act § 509(g) (2002).

[37] FINRA reiterated its position that ''selling away'' claims are arbitrable under the Codes. Under the Codes, FINRA accepts cases brought by customers against associated persons in selling away cases, and cases by customers against the associated person's member firm if there is any allegation that the member was or should have been involved in the events, such as an alleged failure to supervise the associated person. *See, e.g., Multi-Financial Securities Corp.* v. *King,* 386 F.3d 1364 (11th Cir. 2004); *see also In the Matter of PFS Investments, Inc.,* 1998 SEC LEXIS 1547, (Exchange Act Rel. No. 42069) (July 28, 1998).

[38] Burke Letter.

[39] *See* FINRA By-Laws, Article V, § 4(a) (Retention of Jurisdiction).

[40] Rule 12801 of Customer Code and Rule 13801 of Industry Code.

[41] The three exceptions, as described above under II. Description of the Proposed Rule Change, are: (1) The non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release; (2) the moving party was not associated with the account(s), security(ies), or conduct at issue; or (3) the claim is not eligible for arbitration in FINRA's forum, under Rule 12206 of the Customer Code or 13206 of the Industry Code, as applicable.

[42] For example, these commenters contend that claims involving defamation on the Form U5 or those subject to the doctrine of *res judicata* should be exceptions to the rule. *See, e.g.*, SIFMA, Thurman, Morgan Stanley, Rapp, Schrils, Kaufman, and Jacobowitz Letters.

[43] *Id.*

[44] *Id.*

[45] *See, e.g.*, Banks, Lagemann, PIABA 2 and St. John's Letters.

tend to be fact-based, and would, in most cases, require an evidentiary hearing.[46]

FINRA responded by stating that it had considered these comments, and concluded that expanding the exceptions to the rule would negate its intent, which is to have clear, easily definable standards that do not involve fact-intensive issues. FINRA stated that the suggested additional exceptions would require fact-based determinations and, thus, would be inappropriate for dismissal before claimants have presented their cases. Although these exceptions would be inappropriate for prehearing dismissal, FINRA noted that a party would be permitted to file a motion addressing these issues at the conclusion of a claimant's case-in-chief. FINRA stated that the proposal strikes an appropriate balance by ensuring that claimants have their claims heard in arbitration, while minimizing the parties' exposure to additional fees in the event that the claimant does not prove the claims in its case-in-chief. For these reasons, FINRA declined to amend the proposal to expand the exceptions to the rule.

FINRA also specifically stated that it had considered the concerns expressed by commenters regarding clearing firms and the impact the proposal could have on their operations. FINRA indicated that it understands the benefits that clearing firms provide to the operation of the securities markets, but these benefits do not warrant an exception to the rule. FINRA noted that courts have found that a broker-dealer's status as a clearing firm does not immunize it from liability.[47] Further, FINRA stated that the courts have found that clearing firms may be liable for the misdeeds of the introducing firm, if the clearing firms become actively or directly involved in fraudulent activity.[48] Based on these findings, FINRA stated its belief that claimants should have the opportunity to prove in an evidentiary hearing whether a clearing firm's involvement rises to the level of liability. As the issue of a clearing firm's liability in arbitration would be a fact-intensive determination, FINRA stated that issue would be inappropriate for prehearing dismissal. Based on these findings, FINRA declined to amend the proposal to include an exception for clearing firms.

Expansion of the Exception for Prehearing Motions Under the Eligibility Rule To Include Applicable Statutes of Limitation

The proposed changes to the eligibility rules, Rules 12206(b) of the Customer Code and 13206(b) of the Industry Code, would not include applicable statutes of limitation as an exception on which a prehearing motion would be granted.

Many commenters argued that respondents should not be forced to proceed to an evidentiary hearing against parties whose claims could be deemed stale or time-barred under an applicable legal authority.[49] Conversely, several other commenters contended that most statutes of limitation matters raise issues of fact which would require an evidentiary hearing.[50] Some commenters urged FINRA to remove the eligibility exception from the proposal for the same reasons.[51]

FINRA responded by stating that it included the eligibility rule exception in the proposal because its eligibility standard is uniform for all cases (six years from the occurrence or event giving rise to the claim), and does not vary depending on a particular jurisdiction's laws or the cause of action raised by the claim. In addition, FINRA noted that claimants whose cases are dismissed on eligibility grounds have an alternative to resolve their disputes because the current rule gives them the right to take their cases to court.[52] In light of the uniform applicability of the eligibility exception and the additional protections parties receive under the eligibility rule, FINRA declined to amend the proposal to remove the eligibility exception.

Further, FINRA responded that it did not include applicable statutes of limitation in the eligibility exception because such issues involve fact-based determinations, depend on the law of the applicable jurisdiction, and depend on the type of claims alleged. FINRA noted that, in some jurisdictions, courts have found that statutes of limitations do not apply to arbitration proceedings. For these reasons, FINRA stated that it would be inappropriate to include an exception for prehearing motions to dismiss on statute of limitations grounds, and thus, declined to amend the proposal to include them in the eligibility exception.

Motions Permitted at the Conclusion of Claimant's Case-in-Chief

Under Proposed Rules 12504(b) of the Customer Code and 13504(b) of the Industry Code, a motion to dismiss after the conclusion of a party's case-in-chief would not be limited to the three exceptions described above.[53]

Many commenters who supported the proposal argued that this provision would shift abusive motions practice to the middle of the hearing, because respondents would wait until the end of the claimant's case to file their motions, and thus, this provision should be deleted.[54] Several commenters who opposed the proposal argued that the ability to file a motion at the conclusion of a party's case-in-chief does not address their interests effectively, because respondents would have to prepare for and incur the costs of a full evidentiary hearing.[55]

FINRA responded by stating that the proposal strikes a fair balance by sharply limiting prehearing motions to dismiss, but permitting motions to dismiss after the claimant's case-in-chief. FINRA stated that it would be unfair to require the parties to continue with a hearing if the claimant has not proved its case. FINRA indicated that it expects such motions to be relevant to the case and based on theories that are germane to the issues raised in the case-in-chief. FINRA further stated that by the close of the claimant's case, the panel would have heard enough to decide whether a motion filed at the conclusion of a claimant's case should be considered, and, if warranted, granted.

FINRA stated that it will monitor the frequency of motions filed pursuant to this provision once the proposal is implemented. If this analysis indicates potentially abusive behavior, FINRA stated that it may amend the rule or take other appropriate action.

FINRA also stated it will inform arbitrators that, if a party files a motion at the conclusion of a case-in-chief, the panel is not required to consider or grant the motion merely because it was filed pursuant to the rule; rather, arbitrators will continue to control the hearing process. Furthermore, FINRA noted that the proposed rule would not preclude a panel from assessing respondents with sanctions, costs and

[46] *See, e.g.*, Greco, Gross/Black, Ledbetter and PIABA 2 Letters.

[47] *See, e.g., McDaniel* v. *Bear Stearns Co., and Bear Stearns Securities Corporation,* 196 F.Supp. 2d 343 (S.D.N.Y. 2002); *see also, Koruga* v. *Fiserv Correspondent Services, Inc.,* 183 F.Supp.2d 1245 (D. Or. 2001), *aff'd,* 40 Fed.Appx. 364, 2002 WL 530548 (9th Cir. 2002).

[48] Id.

[49] *See, e.g.*, Babnick, Jacobowitz, Krebsbach, Rapp and SIFMA Letters.

[50] *See, e.g.*, Greco, Gross/Black, Ledbetter and PIABA 2 Letters.

[51] *Id.*

[52] Rule 12206(b) of the Customer Code and Rule 13206(b) of the Industry Code.

[53] *See* note 41, *supra.*

[54] *See, e.g.*, Banks, Bernstein, Caruso, Davis and Wilcutts Letters.

[55] *See, e.g.*, Farley, Karp, Krebsbach and Walters Letters.

attorney's fees, if the panel determines that a motion filed at this time is frivolous or in bad faith.[56]

FINRA reiterated that the purpose of the proposal is to ensure that claimants have their claims heard by a panel while permitting respondents, after completion of a claimant's case-in-chief, to challenge a claim they believe lacks merit or has not been proved. FINRA suggested that because arbitrators currently deny most prehearing motions to dismiss, the proposal to permit motions to dismiss at this juncture should not have a significant impact on parties' costs in preparing for a hearing. FINRA stated its belief that respondents' exposure to attorneys' fees and forum fees should be minimized under the proposal because additional hearing sessions will not be required if the panel grants a motion to dismiss at the close of a claimant's case. Further, FINRA stated that, similarly, claimants will not incur additional forum costs if arbitrators believe they have not proved their case and dismiss it before respondents present their case, rather than at the conclusion of the respondents' case.

For these reasons, FINRA declined to amend the proposal.

Concerns Regarding the Procedural Safeguards in the Proposal

Several of the commenters who supported the procedural safeguards in the proposal indicated that these provisions provide protection to investors by creating an effective deterrent to abusive practices.[57] However, multiple commenters opposed some of the proposed procedural safeguards as too stringent. Each proposed procedural rule that generated significant comment is addressed below.

• Unanimous panel decision to grant a prehearing motion.

Proposed Rules 12504(a)(7) of the Customer Code and 13504(a)(7) of the Industry Code would require a unanimous decision by the panel to grant a prehearing motion to dismiss.[58]

The commenters who opposed this provision stated that this requirement is not necessary to ensure a fair decision concerning a prehearing motion to dismiss.[59] Further, these commenters argued that the provision is inconsistent with other provisions of the Codes, which only require a majority decision.[60]

FINRA responded that the type of relief requested by a prehearing motion to dismiss—the complete dismissal of a claim before an evidentiary hearing—justifies the requirement that all arbitrators agree, based on the moving party's proof, that the motion should be granted. FINRA indicated that it recognizes that this standard is different from the criteria for rendering other rulings and determinations.[61] In practice, however, FINRA noted that most awards rendered in its forum are unanimous; thus, FINRA stated that this requirement is not a significant change from current practice. For these reasons, FINRA declined to amend the proposal to change this provision.

• Mandatory assessment of forum fees.

Proposed Rules 12504(a)(8) of the Customer Code and 13504(a)(8) of the Industry Code would require that, if a panel denies a prehearing motion to dismiss, it must assess forum fees associated with hearings on the motion against the moving party.[62]

Commenters who opposed this provision stated that it is unfair to penalize moving parties who file motions to dismiss based on the exceptions available under the proposed rule, and who rely on a claimant's pleadings being accurate and complete when filing these motions.[63]

FINRA responded by stating that this provision on mandatory assessment of forum fees will deter parties from filing motions that fall outside the scope of the three exceptions[64] to the rule, and will provide an incentive for parties to ensure that their prehearing motions to dismiss comply with the intent of the rule.

In response to those commenters who argued that the proposal would punish respondents when a claimant's pleading lacks specificity, FINRA reminded parties that there are no specific pleading requirements under the Codes. FINRA noted that Rules 12302 of the Customer Code and 13302 of the Industry Code require a claimant to supply only ''[a] statement of claim specifying the relevant facts and remedies requested'' along with the required fees, copies, and signed submission agreement in order to initiate an arbitration. Similarly, FINRA pointed out that the answer must include only ''[an] answer specifying the relevant facts and available defenses to the statement of claim.''[65] Further, FINRA stated that parties may obtain further information and documents through the discovery process.[66]

For these reasons, FINRA declined to amend the proposal to change this provision.

Mandatory Assessment of Costs and Attorneys' Fees and Possible Sanctions

Proposed Rules 12504(a)(10) of the Customer Code and 13504(a)(10) of the Industry Code would require that, if a panel deems a prehearing motion to dismiss to be frivolous, it must award reasonable costs and attorneys' fees to any party that opposed the motion.[67] Also, proposed Rules 12504(a)(11) of the Customer Code and 13504(a)(11) of the Industry Code would require that, if a panel deems that a prehearing motion to dismiss was filed in bad faith, it may issue sanctions against the moving party.[68]

Several commenters who opposed the proposal nevertheless supported these provisions as sufficient deterrents against abusive motions practices, and suggested that they would eliminate the need to restrict prehearing motions to dismiss in the forum.[69] Other commenters who opposed the proposal argued that, as drafted, the provisions would result in an increase in the number of motions for costs, fees, and sanctions filed by claimants.[70] These commenters suggested that FINRA should amend the proposal to prohibit claimants from filing such motions, and permit the panel, on its own initiative, to decide whether a motion is frivolous or in bad faith and order relief appropriately.[71]

FINRA responded by stating that it ''anticipates that parties will file fewer prehearing motions to dismiss once the proposal is implemented, which should forestall any increase in the number of motions for costs, fees, and sanctions.''[72] FINRA further stated its belief that the risk of monetary penalties

[56] Rule 12212 of the Customer Code and Rule 13212 of the Industry Code.

[57] *See, e.g.*, Harrison, Mougey, PIABA 2 and St. John's Letters.

[58] *See also* Proposed Rules 12206(b)(5) and 13206(b)(5) of the eligibility rule.

[59] *See, e.g.*, Carreno, Forchheimer, Krebsbach, SIFMA and Wallis Letters.

[60] *Id.*

[61] Rule 12414(a) of the Customer Code and Rule 13414(a) of the Industry Code provide that ''all rulings and determinations of the panel must be made by a majority of the arbitrators, unless the parties agree, or the Code or applicable law provides, otherwise.''

[62] *See also* Proposed Rules 12206(b)(8) and 13206(b)(8).

[63] *See, e.g.*, Amery, Jacobowitz, Karp, Shannon and SIFMA and Letters.

[64] *See* note 41, *supra*.

[65] Rules 12303 and 13303.

[66] *See* Rules 12500–12514 of the Customer Code and 13500–13512 of the Industry Code.

[67] *See also* Proposed Rules 12206(b)(9) and 13206(b)(9) of the eligibility rule.

[68] *See also* Proposed Rules 12206(b)(10) and 13206(b)(10) of the eligibility rule.

[69] *See, e.g.*, Babnick, Kaufman, Krebsbach and Morgan Stanley Letters.

[70] *See, e.g.*, Deutsche Bank, Lampart, SIFMA and Wachovia Letters.

[71] *Id.*

[72] FINRA Letter.

and sanctions, imposed either by the panel on its own initiative, or as a result of a party's motion, should deter parties from filing such motions frivolously or in bad faith. FINRA suggested that, taken together, these enforcement mechanisms should ensure strict compliance with the rules. For these reasons, FINRA declined to amend the proposal to change these provisions.

Clarification of the In-Person or Telephonic Prehearing Conference Criteria

The proposed rule requires that a panel may not grant a motion under the rule unless an in-person or telephonic prehearing conference is held or waived by the parties.[73] One commenter requested clarification concerning what would satisfy the in-person or telephonic prehearing conference requirement.[74] The commenter was concerned that the rules imply that the panel may grant the motion solely on the basis of the submissions from the parties.[75]

FINRA responded by explaining that prehearing conferences conducted under this provision would be subject to Rules 12501 of the Customer Code and 13501 of the Industry Code. Further, FINRA explained that, under the proposal, if the parties agree to waive the prehearing conference, as is permitted currently under the Codes,[76] the panel may grant the motion based solely on the submissions of the parties. FINRA also stated that, if, however, the parties do not agree to waive the prehearing conference, then the panel must hold an evidentiary hearing on the motion at which time the parties will have an opportunity to present their arguments concerning the motion. In this situation, FINRA explained that the panel will have received the information necessary to make an informed decision.

Effect of the Proposal on the Parties' Costs

Many commenters argued that current practice permits respondents to file numerous motions that are rarely granted, and that serve only to delay the hearings, harass claimants, and increase claimants' costs through higher forum fees and lower award amounts once expenses are paid.[77] In general, these commenters indicated that defending these motions to dismiss is a waste of time and resources and, ultimately, will result in the denial of access to the forum for investors with small claims.[78]

A number of commenters argued that the proposal prohibiting most prehearing motions to dismiss would increase all parties' costs, particularly firms', because their attorneys charge on an hourly basis, whereas claimants' attorneys charge on a contingency basis, so claimants are not incurring any costs.[79] Others contended that prohibiting prehearing motions to dismiss nullifies their most important objective—to avoid the expense of preparing for and attending an evidentiary hearing.[80]

FINRA responded by stating that it is not privy to the fee structure used by investors' attorneys or counsel for brokerage firms. However, based on internal data[81] and other statistical studies tracking motions to dismiss in FINRA's forum,[82] FINRA noted that it is aware that when motions to dismiss are filed, they serve to delay the hearings and increase all parties' costs through higher forum fees. As a result, FINRA stated its concern that the current practice by some respondents of filing motions to dismiss, and sometimes multiple motions in one case, could cause investors' attorneys not to take smaller claims, because the costs incurred in defending these motions could exceed the amount in dispute. FINRA stated that it anticipates that the proposal will continue to make the forum accessible to investors, particularly those with small claims, by minimizing the number of motions to dismiss filed in the forum, and by shifting the costs and fees associated with denied motions to dismiss to the moving party. FINRA stated that the proposal's benefits protecting investors' access to the forum and their ability to have claims heard in arbitration outweigh the possibility of increased costs and expenses firms might incur under the rule. For these reasons, FINRA declined to amend the proposal to address this concern.

Additional Statistical Support

Several commenters who opposed the proposal argued that FINRA did not provide enough objective evidence to support the changes proposed.[83] These commenters suggested that anecdotal evidence of abuse is not sufficient proof that prehearing motions to dismiss should be prohibited.

FINRA responded that it disagrees with these commenters. FINRA stated that a significant number of changes to FINRA's arbitration rules have begun with users of the forum expressing a concern or complaint to FINRA. FINRA further stated that it relies on its constituents to inform it of concerns with its rules, arbitrator conduct, or abusive practices. Moreover, FINRA noted that once FINRA staff members become aware of a problem, they investigate further, and propose changes to the rules to address the concern, if necessary.

FINRA stated that, in the case of motions to dismiss, it received many complaints from users of the forum documented with copies of motions to dismiss, responses, and the panels' denials of those motions. FINRA stated that it also learned through a Securities Arbitration Commentator study that the number of motions to dismiss filed in customer cases had begun to increase over a two year period, starting in 2004.[84] The Study was conducted on motions to dismiss in customer cases and concluded that, of the cases that went to award in 2006, 28% had motions to dismiss as compared to 10% of cases that went to award in 2004.[85] FINRA found the results of the Study ''alarming'' not only because of the significant increase in the motions filed in these cases, but also because the Study did not include cases that settled during that time. As a result of this analysis, FINRA indicated that it became concerned that, if left unregulated, this type of motions practice would limit investors' access to the forum, which is antithetical to FINRA's goals of investor protection and market integrity.

In light of the Study and concerns raised by constituents, FINRA began tracking motions to dismiss in 2007. FINRA noted that from January 1, 2007 to July 1, 2008, there have been 6,079 arbitration cases filed in the forum,[86] and a total of 754 motions to dismiss filed in these cases. Further, FINRA

[73] Proposed Rules 12504(a)(5) of the Customer Code and 13504(a)(5) of the Industry Code. *See also* Proposed Rules 12206(b)(4) and 13206(b)(4) of the eligibility rule.

[74] St. John's Letter.

[75] *Id.*

[76] Rule 12105(a) of the Customer Code and Rule 13105(a) of the Industry Code.

[77] *See, e.g.*, Buchwalter, Haigney, Neuman and Stoltmann Letters.

[78] *Id. See also, e.g.*, Estell, Forman and St. John's Letters.

[79] *See, e.g.*, Hartman, Kemnitz, Morgan Stanley and Schrils Letters.

[80] *See, e.g.*, Berberian, Davidson, Dulcich and McDermott Letters.

[81] *See Additional statistical support* section below for updated statistics on motions to dismiss filed in FINRA's forum.

[82] *See Securities Arbitration Commentator,* Nov. 2006 (Vol. 2006, No. 5) (''Study'').

[83] *See, e.g.*, Astarita, Berberian, Davidson and Farley Letters.

[84] *See*, note 82, *supra,* at 3.

[85] *Id.*

[86] The data do not include cases filed in the NYSE Regulation arbitration forum.

noted that in 10% of the 6,079 cases, parties filed one or more motions to dismiss, and in 2% of the 6,079 cases, parties filed two or more motions to dismiss. FINRA stated that these current statistics suggest that the number of motions to dismiss filed in the forum may be declining since the Study was conducted. FINRA opined that the reduction in these motions reflects its focus on this issue, through enhanced arbitrator training as well as a 2006 Notice to Parties to remind parties of the forum's policy and parties' responsibilities when filing motions to dismiss.[87] FINRA indicated that even though the number of motions filed appears to be declining in the forum, the proposal will serve to reduce further the number of prehearing motions to dismiss filed, and, in particular, should prevent parties from filing multiple motions in a case. For these reasons, FINRA stated that its statistical and anecdotal evidence is sufficient support for the proposal, and that the proposal should be approved as drafted.

Alternate Criteria To Provide Specific Guidance to Arbitrators When Deciding Motions To Dismiss

Several commenters suggested that the proposal should establish a specific standard for arbitrators to use when deciding motions to dismiss.[88] Most of these commenters suggested that panels should deny prehearing motions to dismiss whenever: (1) Credibility is an issue; (2) there are disputed issues of material fact; or (3) the panel believes a hearing is necessary in the interests of justice.[89]

FINRA responded by stating that it considered incorporating these criteria into the rule but determined that this would be inconsistent with the Codes, which do not contain such specific standards for arbitrator decision making. FINRA further stated that because arbitration is an equitable forum, the panel may consider any evidence or use any method to achieve a fair result. FINRA indicated that it did not intend for the proposal to change this practice.

Moreover, FINRA stated that establishing a specific approach for arbitrators to follow would infringe on arbitrators' discretion to decide arbitration cases. FINRA stated that the intent of the proposal was to select a very limited number of exceptions for granting prehearing motions to dismiss that would be relatively clear-cut for the panel to apply at this stage of the proceedings. FINRA stated that parties should argue their positions and arbitrators should be permitted to use their discretion in determining how motions to dismiss should be decided. For these reasons, FINRA declined to amend the proposal to incorporate a specific standard for arbitrators to use when deciding motions to dismiss.

Motion To Dismiss Policies of Other Securities Arbitration Forums

One commenter contended that the former New York Stock Exchange (''NYSE'') arbitration forum did not permit prehearing motions to dismiss.[90] Another commenter stated that the NYSE Regulation arbitration forum would not permit arbitrators to grant motions to dismiss before an investor had the opportunity to present his or her claims at an evidentiary hearing on the merits.[91]

FINRA stated that it responded to this comment previously in regard to the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc.[92] FINRA noted that the NYSE Regulation arbitration forum had neither a rule nor a written policy on motions to dismiss, and FINRA was not aware that motions to dismiss were prohibited in the NYSE Regulation arbitration forum. Rather, FINRA stated its understanding that, in the NYSE forum, the panel determined whether and if so, when, a motion to dismiss would be heard.

Proposal's Impact on the Parties' Negotiations

A number of commenters argued that the proposal would create settlement value for claimants because respondents would have to conduct a cost-benefit analysis to determine whether the cost of settling the dispute is more beneficial than losing a prehearing motion to dismiss and proceeding to evidentiary hearing.[93] Generally, the commenters who supported the proposal stated that it would reduce all parties' costs because the parties would no longer waste resources arguing frivolous prehearing motions to dismiss that are rarely granted.[94]

FINRA responded that it agrees with those commenters who believe the proposal would reduce all parties' costs because the number of prehearing motions to dismiss in the forum should decrease once the proposal is implemented. Moreover, FINRA stated that it believes that respondents are more likely to conduct a cost-benefit analysis concerning whether to proceed with an arbitration based on the strength or weakness of their claims or defenses, not the existence of a motion to dismiss rule. For this reason, FINRA declined to amend the proposal at this time.

Proposal's Effect on Parties Who Settle Claim Before Hearing

Proposed Rules 12504(a)(3) of the Customer Code and 13504(a)(3) of the Industry Code provide that, unless the parties agree or the panel determines otherwise, parties must serve motions to dismiss at least 60 days before a scheduled hearing, and parties have 45 days to respond to the motion.

The author of a February 2008 Securities Arbitration Commentator (''SAC'') article suggested that, under the proposal, parties would not be permitted to settle a claim and have it dismissed before the evidentiary hearing, if the 60-day deadline has passed and the parties have not yet filed a prehearing motion.[95]

FINRA responded to the suggestion in the article by noting that the proposal does not preclude parties from agreeing to settle at any time. FINRA pointed out that Rules 12105 and 12207 of the Customer Code[96] permit the parties to agree to extend the deadlines for filing or responding to motions. FINRA stated that the proposal would not prohibit the parties from taking these actions.

Moreover, FINRA stated that the proposed rule is not intended to apply to motions made jointly by all parties to dismiss a case because of a settlement. FINRA pointed out that, under the Codes, if all parties agree to settle a case, FINRA will close the case based on the settlement agreement.[97] FINRA stated that this process is different from that contemplated by the proposal, in which a panel grants one party's motion to

[87] *See* Notice to Parties on Motions to Dismiss under the Code of Arbitration Procedure for Customer and Industry Disputes available at *http://www.finra.org/ArbitrationMediation/ResourcesforParties/NoticestoParties/p037078.* The *Notice* continues to be effective.

[88] *See, e.g.*, Gross/Black, Honigman, Van Kampen and Wachovia Letters.

[89] *Id.*

[90] Tepper Letter.

[91] Canning Letter.

[92] *See* Supplemental Response to Comments from Linda D. Fienberg, President, Dispute Resolution, dated May 29, 2007. The SEC approved the consolidation of member firm regulatory operations of NASD and NYSE on July 26, 2007. Securities Exchange Act Rel. No. 56145, 72 FR 42169 (Aug. 1, 2007) (SR–NASD–2007–023) (approval order).

[93] *See, e.g.*, Amery, Buckman, Gelber and Shannon Letters.

[94] *See, e.g.*, Buchwalter, Haigney, Neuman and Stoltmann Letters.

[95] Harry A. Jacobowitz, ''Roadblocks at the Exits: FINRA's Proposed Dispositive Motions Rule,'' *Securities Arbitration Commentator,* February 2008 (Vol. 2007, No. 4), at 1.

[96] *See also* Rules 13105 and 13207 of the Industry Code.

[97] Rule 12902(d) of the Customer Code and Rule 13902(d) of the Industry Code.

dismiss a case before an evidentiary hearing is held.

Motions To Dismiss as Awards

The author of a different February 2008 SAC article argued that arbitrator decisions on motions to dismiss are awards and should be published as required under the Code.[98]

FINRA responded to the comments in this article by stating that, under the Code, an award is a document stating the disposition of a case.[99] FINRA explained that, if a motion to dismiss all claims is granted and disposes of all open issues, it would be reported as an award. FINRA further explained that a decision to grant a motion to dismiss that does not dismiss all of the parties or end the dispute would not be an award; rather, it would be considered an order of the panel and would not be made publicly available.

IV. Discussion and Findings

After careful review of the proposed rule change, the comments and FINRA's response to the comments, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities association.[100] In particular, the Commission believes the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, [101] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission believes that the proposed rule change would enhance investor confidence in the fairness and neutrality of FINRA's arbitration forum by ensuring that non-moving parties have their claims heard in arbitration, while preserving the moving parties' rights to challenge the necessity of a hearing in certain limited circumstances. Further, the Commission believes the proposed changes to the eligibility rule would help prevent manipulative practices by closing a loophole in the existing rule, so that parties may pursue their claims in court without facing an unintended legal impediment, in the event their claims are dismissed in arbitration on eligibility grounds.[102]

Policy Statement on Prehearing Motions

The Commission believes that FINRA has adequately responded to the comments regarding FINRA's proposed policy statement on prehearing motions. The Commission agrees that parties have the right to a hearing in arbitration, and that prehearing motions to dismiss should be limited. The Commission also agrees with FINRA that proposed Rules 12504(a)(1) of the Customer Code and 13504(a)(1) of the Industry Code reinforce this position by clarifying that prehearing motions to dismiss are discouraged in arbitration.

Further, the Commission believes that FINRA adequately responded to the commenters who contend that this policy statement unfairly discourages all motions to dismiss in the forum, by pointing out that the proposal permits parties to file a motion to dismiss on any ground after the conclusion of a party's case in chief.

Finally, given the comments that were received in response to the original proposal, which stated that motions to dismiss should be granted only in extraordinary circumstances, the Commission believes that FINRA has appropriately refined the statement to reflect FINRA's policy while eliminating any ambiguity created by the words ''extraordinary circumstances.''

The Commission's oversight of the securities arbitration process is directed at ensuring that it is fair and efficient. As noted above, FINRA had received complaints that parties were filing dispositive motions routinely and repetitively in an apparent effort to delay scheduled hearing sessions on the merits, increase investors' costs, and intimidate less sophisticated parties. This type of abusive motions practice undermines the fairness and efficiency of the securities arbitration process. The proposed rules, which strictly limit the grounds for filing pre-hearing motions to dismiss, and impose sanctions on parties that engage in abusive practices, are designed to enhance the fairness and efficiency of the process. The Commission believes that FINRA's policy statement sets a clear tone that commands a narrow reading of the provisions setting forth the grounds on which parties may bring a motion to dismiss prior to the conclusion of a party's case in chief. A narrow reading of those provisions is essential to help achieve FINRA's overarching goal of the proposal: To enhance investor confidence in the fairness and neutrality of FINRA's arbitration forum by ensuring that non-moving parties have their claims heard in arbitration, while preserving the moving parties' rights to challenge the necessity of a hearing in certain limited circumstances. Furthermore, this policy statement is consistent with other parts of the Codes, where FINRA sets forth procedures that are only permitted to be used in limited circumstances.[103]

Scope of Proposed Rules 12504(a)(6) of the Customer Code and 13504(a)(6) of the Industry Code With Respect to Clearing Firms

The Commission carefully considered a commenter's arguments that when a statement of claim does not make factual allegations of direct misconduct by a clearing firm, the clearing firm should be dismissed from the case.[104] Under applicable rules of self-regulatory organizations, all clearing agreements must identify the division of duties between the introducing and clearing brokers.[105] Typically, an introducing or correspondent broker deals directly with the public and originates customer accounts [106] while the clearing broker handles functions related to the clearance and settlement of trades in the accounts of its introducing broker.[107] The clearing broker usually has no direct contact with the customers of its introducing broker, except for the periodic mailing of reports and other records relating to their accounts.[108] However, a clearing broker may expose itself to liability with respect to the introducing broker's misdeeds ''where a clearing firm moves beyond performing mere ministerial or routine clearing functions [with actual knowledge] and becomes actively and directly involved

[98] Richard P. Ryder, ''Disposing of Dispositive Motions: The Process to Date,'' *Securities Arbitration Commentator,* February 2008 (Vol. 2007, No. 4), at 10; *see also* Jacobowitz Letter.

[99] Rule 12100(b) of the Customer Code and Rule 13100(b) of the Industry Code.

[100] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. *See* 15 U.S.C. 78c(f).

[101] 15 U.S.C. 78o–3(b)(6).

[102] As described above, under the existing rule, if a respondent files a motion to dismiss based on several grounds, including eligibility, and the panel issues an order dismissing a claim, but without citing reasons, the claimants would not know whether or not they are afforded the right to pursue the claim in court. If the claimants proceed to file the dismissed claim in court, the respondents may argue that the panel's decision on the claim is the final decision, and that claimants are barred from having the court decide the same claim again.

[103] *See, e.g.,* NASD Rules 12507(a)(1), which states that ''interrogatories are generally not permitted in arbitration,'' while setting forth limited types of written discovery requests and 12510 (Depositions), which states that ''depositions are strongly discouraged in arbitration,'' while setting forth a list of the limited circumstances in which depositions are permitted.

[104] *See* SIFMA Letter.

[105] *See, e.g.,* NYSE Rule 382, NASD Rule 3230, Amex Rule 400.

[106] *See Katz v. Fin. Clearing & Serv. Corp.,* 794 F. Supp. 88, 90 (S.D.N.Y. 1992).

[107] *Dillon* v. *Militano,* 731 F. Supp. 634, 636 (S.D.N.Y. 1990).

[108] *Stander* v. *Fin. Clearing & Serv. Corp.,* 730 F. Supp. 1282, 1285 (S.D.N.Y. 1990).

in the introducing broker's [fraudulent] actions. * * *'' [109] Although findings of liability against clearing brokers are unusual, courts have upheld arbitration awards against clearing brokers, finding that the arbitrators did not act with ''manifest disregard of the law.'' [110]

Because claimants generally need to be able to develop the facts to argue the liability of a clearing firm in a particular dispute, the Commission agrees with FINRA's analysis that it would be inappropriate for clearing firms to be eligible for prehearing dismissal based solely on their status as clearing brokers. Under the proposed rule, however, clearing firms will continue to be permitted to file motions to dismiss for any reason after the conclusion of the claimant's case in chief. The Commission believes that this strikes an appropriate balance between providing claimants an opportunity to resolve factual disputes and limiting clearing firms' needless involvement in disputes. The Commission staff has asked FINRA to request that SIFMA provide it with available statistics regarding all motions to dismiss filed by clearing firms in the past and until the effective date of the proposed rule change.[111] Further, the Commission has asked FINRA to maintain statistics on motions to dismiss filed by clearing firms for a period of six months from the effective date of this proposed rule change, to shed greater light on any burdens imposed on clearing firms. The Commission has also asked FINRA to consider additional steps it could take to inform parties of the distinction between introducing brokers and clearing brokers.

Scope of Proposed Rules 12504(a)(6)(B) of the Customer Code and 13504(a)(6)(B) of the Industry Code (''Not Associated'' Exception)

With respect to the comments regarding the ''not associated'' exception, the Commission believes that FINRA responded appropriately. Specifically, FINRA indicated that it intends this exception to apply narrowly, such as in cases involving issues of misidentification. FINRA further clarified the meaning of ''not associated'' by providing examples of ways in which the exception could be invoked. The Commission agrees with FINRA that the ''not associated'' exception would be inappropriate in cases in which a respondent may be liable as a supervisor or control person under applicable statutes or in ''selling away'' cases.

The Commission recognizes that certain situations, such as cases involving mistaken identity, would merit a prehearing dismissal, which is why the Commission supports the existence of a ''not associated'' exception within the rules. However, as stated above, the Commission believes that a narrow interpretation of the exceptions is appropriate.

Additional Exceptions for Permissible Prehearing Motions

With respect to the comments requesting that FINRA incorporate additional exceptions for prehearing motions to dismiss, the Commission believes that FINRA responded appropriately. Specifically, the Commission agrees with FINRA's conclusion that expanding the exceptions to the rule would negate its intent, which is to have clear, easily definable standards for permissible prehearing motions to dismiss that do not involve fact-intensive issues. Moreover, the Commission agrees that the suggested additional exceptions would require fact-based determinations and, thus, would be inappropriate for dismissal before a claimant has presented its case. As FINRA pointed out, a party is permitted to file a motion to dismiss on any basis after the conclusion of a party's case in chief.

The Commission believes that, particularly with respect to the limited exceptions to prehearing motions, the proposal strikes an appropriate balance by ensuring that claimants have their claims heard in arbitration, while minimizing the parties' exposure to additional fees in the event that the claimant does not prove the claims in its case-in-chief.

Expansion of the Exception for Prehearing Motions Under the Eligibility Rule To Include Applicable Statutes of Limitation

With respect to the comments regarding statutes of limitations, the Commission believes that eligibility is an appropriate ground for a prehearing motion to dismiss because of its uniform application in all cases, and because of the additional protections parties receive under the eligibility rule. As FINRA explained, statutes of limitations involve fact-based determinations, depend on the law of the applicable jurisdiction, and depend on the type of claims alleged. Moreover, FINRA noted that, in some jurisdictions, courts have found that statutes of limitations do not apply to arbitration proceedings. For these reasons, the Commission agrees with FINRA's conclusion that it would be inappropriate to include an exception for prehearing motions to dismiss on statute of limitations grounds.

Motions Permitted at the Conclusion of Claimant's Case-In-Chief

With respect to the argument that this provision will shift abusive motions practice to the middle of the hearing, because respondents will wait until the end of claimant's case to file their motions, the Commission believes FINRA responded appropriately. In particular, the Commission agrees with FINRA's assertion that it would be unfair to require the parties to continue with a hearing if the claimant has not proved its case.

The Commission staff has requested that FINRA gather statistics on a going-forward basis, to determine whether abusive motions practice becomes apparent in the post-hearing phase of arbitration. In response, FINRA stated that it will monitor the frequency of motions filed pursuant to this provision once the proposal is implemented. FINRA has agreed to analyze the information to determine whether potentially abusive behavior develops, and FINRA stated that it may propose further amendments to the rules that are subject to this proposal or take other appropriate action.

In addition, further to discussions with the Commission staff, FINRA noted in its response that the proposed rule would not preclude a panel from assessing respondents with sanctions, costs and attorney's fees, if the panel determines that a motion filed at this time is frivolous or in bad faith.

Concerns Regarding the Procedural Safeguards and Mandatory Assessment of Costs and Attorneys' Fees and Possible Sanctions

With respect to the comments regarding the procedural safeguards and mandatory assessment of costs and fees and possible sanctions, the Commission believes FINRA responded appropriately. The Commission believes that the proposal's procedural safeguards are carefully designed to enhance the fairness and neutrality of FINRA's arbitration forum. The Commission further believes that the mandatory assessment of costs and attorneys' fees and possible sanctions serves the necessary function of deterring parties from filing such motions frivolously or in bad faith, and

[109] *McDaniel* v. *Bear Stearns & Co.,* 196 F. Supp. at 353.

[110] *See, e.g., id; see also*, *Koruga,* 183 F.Supp.2d at 1247.

[111] To the extent that firms and other interested parties have access to information or statistics that would be relevant, such firms and parties are invited to send such information to the attention of the staff of FINRA Dispute Resolution.

should ensure strict compliance with the rules.

Effect of the Proposal on the Parties' Costs

With respect to the comments suggesting that the proposal prohibiting prehearing motions to dismiss except on limited grounds would increase all parties' costs, particularly firms', because their attorneys charge on an hourly basis (whereas claimants' attorneys charge on a contingency basis, so claimants are not incurring any costs),[112] the Commission is unconvinced. The Commission believes FINRA responded appropriately by highlighting the effect of motions to dismiss on all parties' costs and the potential for claimants' attorneys to be reluctant to take on small cases due to costs associated with motions to dismiss. Furthermore, the Commission agrees with FINRA's ultimate determination that the proposal's benefits of protecting investors' access to the forum and their ability to have claims heard in arbitration outweigh the possibility of increased costs and expenses firms might incur under the rule.

General

In general, the Commission believes that FINRA has responded to the comments adequately and appropriately, and has explained how the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities association. As noted above, the Commission believes that the proposal would help achieve the overarching goal of ensuring that parties would have their claims heard in arbitration, by significantly limiting the grounds for filing motions to dismiss prior to the conclusion of a party's case in chief and by imposing stringent sanctions against parties for engaging in abusive practices under the rule. At the same time, the Commission believes that the proposal would not unduly limit the rights of parties to seek dismissal, because it would allow prehearing motions to dismiss in certain limited circumstances, and it would not affect the ability of parties to seek dismissal after the conclusion of the claimant's case in chief. As such, the Commission finds that the proposal would contribute to the fairness and efficiency of the securities arbitration process.

[112] *See, e.g.*, Hartman, Kemnitz, Morgan Stanley and Schrils Letters.

V. Conclusions

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[113] that the proposed rule change (SR–FINRA–2007–021), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[114]

Florence E. Harmon

Acting Secretary.

[FR Doc. E9–12 Filed 1–6–09; 8:45 am]

BILLING CODE 8011–01–P

[113] 15 U.S.C. 78s(b)(2).

[114] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59186; File No. SR–NASDAQ–2008–103]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Extend the Pilot Program for NASDAQ Last Sale Data Feeds

December 30, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 24, 2008, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend for three months the pilot that created the NASDAQ Last Sale (''NLS'') market data products. NLS allows data distributors to have access to real-time market data for a capped fee, enabling those distributors to provide free access to the data to millions of individual investors via the internet and television. Specifically, NASDAQ offers the ''NASDAQ Last Sale for NASDAQ'' and ''NASDAQ Last Sale for NYSE/Amex'' data feeds containing last sale activity in U.S. equities within the NASDAQ Market Center and reported to the jointly-operated FINRA/NASDAQ Trade Reporting Facility (''FINRA/NASDAQ TRF'').

This pilot program supports the aspiration of Regulation NMS to increase the availability of proprietary data by allowing market forces to determine the amount of proprietary market data information that is made available to the public and at what price. During the current pilot period, the program has vastly increased the availability of NASDAQ proprietary market data to individual investors. Based upon data from NLS distributors, NASDAQ believes that since its launch in July 2008, the NLS data has been viewed by over 50,000,000 investors on websites operated by Google, Interactive Data, and Dow Jones, among others. The text of the proposed rule change is available at NASDAQ, the Commission's Public Reference Room, and *http://nasdaq.complinet.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A.Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Prior to the launch of NLS, public investors that wished to view market data to monitor their portfolios generally had two choices: (1) Pay for real-time market data or (2) use free data that is 15 to 20 minutes delayed. To increase consumer choice, NASDAQ proposed a four-month pilot to offer access to real-time market data to data distributors for a capped fee, enabling those distributors to disseminate the data via the internet and television at no cost to millions of internet users and television viewers. NASDAQ now proposes a three-month extension of that pilot program asset [sic] forth in the original proposal as described below.

The NLS pilot created two separate ''Level 1'' products containing last sale activity within the NASDAQ market and reported to the jointly-operated FINRA/

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

NASDAQ TRF. First, the ''NASDAQ Last Sale for NASDAQ Data Product,'' a real-time data feed that provides real-time last sale information including execution price, volume, and time for executions occurring within the NASDAQ system as well as those reported to the FINRA/NASDAQ TRF. Second, the NASDAQ Last Sale for NYSE/Amex data product that provides real-time last sale information including execution price, volume, and time for NYSE- and Amex-securities executions occurring within the NASDAQ system as well as those reported to the FINRA/NASDAQ TRF.

NASDAQ developed these product proposals in consultation with industry members and also market data vendors and purchasers. These products are designed to meet the needs of current and prospective subscribers that do not need or are unwilling to pay for the consolidated data provided by the SIP Level 1 products. NASDAQ is also proposing to ease the administrative burden of market data vendors that are receiving and using data in new ways, particularly those that provide the data via the internet and various television media. Providing investors with new options for receiving market data was a primary goal of the market data amendments adopted in Regulation NMS.

NASDAQ established two different pricing models, one for clients that are able to maintain username/password entitlement systems and/or quote counting mechanisms to account for usage, and a second for those that are not. Firms with the ability to maintain username/password entitlement systems and/or quote counting mechanisms will be eligible for a specified fee schedule for the NASDAQ Last Sale for NASDAQ Product and a separate fee schedule for the NASDAQ Last Sale for NYSE/Amex Product: Firms that were unable to maintain username/password entitlement systems and/or quote counting mechanisms will also have multiple options for purchasing the NASDAQ Last Sale data. These firms chose between a ''Unique Visitor'' model for internet delivery or a ''Household'' model for television delivery. Unique Visitor and Household populations must be reported monthly and must be validated by a third-party vendor or ratings agency approved by NASDAQ at NASDAQ's sole discretion. In addition, to reflect the growing confluence between these media outlets, NASDAQ offered a reduction in fees when a single distributor distributes NASDAQ Last Sale Data Products via multiple distribution mechanisms. Finally, NASDAQ established cap of $100,000 per month for NASDAQ Last Sale for NASDAQ and $50,000 per month for NASDAQ Last Sale for NYSE/Amex. NASDAQ believed that it is reasonable and appropriate to benefit small and medium-sized vendors by proposing a progressive fee schedule and to benefit large vendors by proposing to cap the monthly fees.

As with the distribution of other NASDAQ proprietary products, all distributors of the NASDAQ Last Sale for NASDAQ and/or NASDAQ Last Sale for NYSE/Amex products would pay a single $1500/month NASDAQ Last Sale Distributor Fee in addition to any applicable usage fees. The $1,500 monthly fee will apply to all distributors and will not vary based on whether the distributor distributes the data internally or externally or distributes the data via both the internet and television.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[3] in general and with Section 6(b)(4) of the Act,[4] as stated above, in that it provides an equitable allocation of reasonable fees among users and recipients of NASDAQ data. In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

The NASDAQ Last Sale market data products proposed here appear to be precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

> [E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[5]

By removing ''unnecessary regulatory restrictions'' on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether, proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well.

NASDAQ's ability to price its Last Sale Data Products is constrained by (1) Competition between exchanges and other trading platforms that compete with each other in a variety of dimensions; (2) the existence of inexpensive real-time consolidated data and free delayed consolidated data, and (3) the inherent contestability of the market for proprietary last sale data.

The market for proprietary last sale data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market.

Broker-dealers currently have numerous alternative venues for their order flow, including eleven self-regulatory organization (''SRO'') markets, as well as broker-dealers (''BDs'') and aggregators such as the BATS electronic communications network (''ECN'').[6] Each SRO market competes to produce transaction reports via trade executions, and an ever-increasing number of FINRA-regulated Trade Reporting Facilities (''TRFs'') compete to attract internalized transaction reports. It is common for BDs to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products.

The large number of SROs, TRFs, and ECNs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products.

[3] 15 U.S.C. 78f.

[4] 15 U.S.C. 78f–3(b)(4).

[5] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[6] The Commission notes that BATS no longer operates as an ECN, rather BATS operates as a national securities exchange. *See* Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008).

Each SRO, TRF, ECN and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including NASDAQ, NYSE, Amex, NYSEArca, and BATS.

Any ECN or BD can combine with any other ECN, broker-dealer, or multiple ECNs or BDs to produce jointly proprietary data products. Additionally, non-broker-dealers such as order routers like LAVA, as well as market data vendors can facilitate single or multiple broker-dealers' production of proprietary data products. The potential sources of proprietary products are virtually limitless.

The fact that proprietary data from ECNs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products, as BATS does today by publishing its proprietary book data on the Internet.[7] Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace writ large.

Consolidated data provides two additional measures of pricing discipline for proprietary data products that are a subset of the consolidated data stream. First, the consolidated data is widely available in real-time at $1 per month for non-professional users. Second, consolidated data is also available at no cost with a 15- or 20-minute delay. Because consolidated data contains marketwide information, it effectively places a cap on the fees assessed for proprietary data (such as last sale data) that is simply a subset of the consolidated data. The mere availability of low-cost or free consolidated data provides a powerful form of pricing discipline for proprietary data products that contain data elements that are a subset of the consolidated data, by highlighting the optional nature of proprietary products.

Market data vendors provide another form of price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only that data which will enable them to attract ''eyeballs'' that contribute to their advertising revenue. Retail broker-dealers, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: they can simply refuse to purchase any proprietary data product that fails to provide sufficient value. NASDAQ and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to successfully market proprietary data products.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with examples entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TracECN, and BATS Trading. Several ECNs have existed profitably for many years with a minimal share of trading, including Bloomberg Tradebook and NexTrade.

Regulation NMS, by deregulating the market for proprietary data, has increased the contestability of that market. While broker-dealers have previously published their proprietary data individually, Regulation NMS encourages market data vendors and broker-dealers to produce proprietary products cooperatively in a manner never before possible. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg, Reuters and Thomson. New entrants are already on the horizon, including ''Project BOAT,'' a consortium of financial institutions that is assembling a cooperative trade collection facility in Europe. These institutions are active in the United States and could rapidly and profitably export the Project Boat technology to exploit the opportunities offered by Regulation NMS.

In establishing the price for the NASDAQ Last Sale Products, NASDAQ considered the competitiveness of the market for last sale data and all of the implications of that competition. NASDAQ believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish a fair, reasonable, and not unreasonably discriminatory fee and an equitable allocation of fees among all users.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. To the contrary, the NASDAQ Last Sale Products respond to and enhance competition that already exists in the market.

On May 28, 2008, the internet portal Yahoo! announced that it would offer its Web site viewers real-time last sale data provided by BATS Trading. NASDAQ's last sale data products would compete directly with the BATS product disseminated via Yahoo! because BATS Trading has substantially less market share in NASDAQ-listed issues and its market data is less complete.[8] Preventing NASDAQ from responding to this competition from its less-regulated competitor runs counter to the pro-competitive goals of the Act.

In addition, as set forth in detail above, the market for last sale data is already competitive, with both real-time and delayed consolidated data as well as the ability for innumerable entities begin rapidly and inexpensively to offer competitive last sale data products. Moreover, the New York and American Stock Exchanges have each proposed to distribute competing last sale data products. Under the deregulatory regime of Regulation NMS, there is no limit to the number of competing products that can be developed quickly and at low cost. The Commission should not stand in the way of enhanced competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Three comment letters were filed regarding the proposed rule change as originally published for comment. NASDAQ responded to these comments in a letter dated December 13, 2007. Both the comment letters and NASDAQ's response are available on the SEC Web site at *http://www.sec.gov/comments/sr-nasdaq-2006–060/nasdaq2006060.shtml.*

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

[7] *Id.*

[8] *Id.*

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2008–103 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2008–103. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2008–103 and should be submitted on or before January 28, 2009.

IV. Commission's Findings and Order Granting Accelerated Approval of a Proposed Rule Change

The Commission finds that the proposed rule change, to extend the pilot program for three months, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[9] In particular, it is consistent with Section 6(b)(4) of the Act,[10] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities, and Section 6(b)(5) of the Act,[11] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also finds that the proposed rule change is consistent with the provisions of Section 6(b)(8) of the Act,[12] which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Finally, the Commission finds that the proposed rule change is consistent with Rule 603(a) of Regulation NMS,[13] adopted under Section 11A(c)(1) of the Act, which requires an exclusive processor that distributes information with respect to quotations for or transactions in an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.[14]

The Commission approved the fee for the NASDAQ Last Sale Data Feeds for a pilot period which runs until December 31, 2008.[15] The Commission notes that the Exchange proposes to extend the pilot program for three months. The Exchange proposes no other changes to the existing pilot program.

On December 2, 2008, the Commission issued an approval order (''Order'') that sets forth a market-based approach for analyzing proposals by self-regulatory organizations to impose fees for ''non-core'' market data products, such as the NASDAQ Last Sale Data Feeds.[16] The Commission believes that Nasdaq's proposal to temporarily extend the pilot program is consistent with the Act for the reasons noted in the Order.[17] The Commission believes that approving NASDAQ's proposal to temporarily extend the pilot program that imposes a fee for the NASDAQ Last Sale Data Feeds for an additional three months will be beneficial to investors and in the public interest, in that it is intended to allow continued broad public dissemination of increased real-time pricing information. In addition, extending the pilot program for an additional three months will allow NASDAQ, consistent with its representation,[18] to file, the public to comment on, and the Commission to analyze consistent with the Order and in light of Section 19(b) of the Act, a proposal to permanently approve the fee for NASDAQ Last Sale Data Feeds.

The Commission finds good cause for approving the proposed rule change before the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Accelerating approval of this proposal is expected to benefit investors by continuing to facilitate their access to widespread, free, real-time pricing information contained in the NASDAQ Last Sale Data Feeds. Therefore, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,[19] to approve the proposed rule change on an accelerated basis to extend the operation of the pilot until March 31, 2009.

Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–NASDAQ–2008–103) is hereby approved on an accelerated basis until March 31, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E9–10 Filed 1–6–09; 8:45 am]

BILLING CODE 8011–01–P

[9] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[10] 15 U.S.C. 78f(b)(4).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78f(b)(8).

[13] 17 CFR 242.603(a).

[14] NASDAQ is an exclusive processor of its last sale data under Section 3(a)(22)(B) of the Act, 15 U.S.C. 78c(a)(22)(B), which defines an exclusive processor as, among other things, an exchange that distributes data on an exclusive basis on its own behalf.

[15] *See* Securities Exchange Act Release Nos. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR–NASDAQ–2006–060) and 58894 (October 31, 2008), 73 FR 66953 (November 12, 2008) (SR–NASDAQ–2008–086).

[16] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data).

[17] *See supra* note 15.

[18] Telephone conversation between Jeffrey Davis, Vice President and Deputy General Counsel, NASDAQ, and John Roeser, Assistant Director, Division of Trading and Markets, Commission, on December 29, 2008.

[19] 15 U.S.C. 78s(b)(2).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59177; File No. SR–NYSE–2008–136]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Pilot Liquidity Provider Credit on the NYSE Bonds System

December 30, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 22, 2008, the New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NYSE. The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the pilot program that issues liquidity providers a $20 credit for certain bond trades executed on the NYSE Bonds℠ system (''NYSE Bonds'') with an execution size of less than 20 bonds to December 31, 2009. The Exchange also seeks to make technical amendments to the fee schedule.

The text of the proposed rule change is available at NYSE, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NYSE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NYSE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The New York Stock Exchange LLC (the ''Exchange'' or the ''NYSE'') proposes to extend the pilot program that issues liquidity providers a $20 credit for certain bond trades executed on the NYSE Bonds℠ system (''NYSE Bonds'') with an execution size of less than 20 bonds to December 31, 2009.

A liquidity provider is one who posts liquidity to NYSE Bonds. During the course of clearing their bond trades, liquidity providers absorb clearing costs. In order to offset these clearing costs, liquidity providers may increase the offer price or decrease the bid price of the bond. In doing so, the best execution of a bond order may be compromised as clearing costs increase with smaller orders.

Accordingly, the Exchange proposes that liquidity providers continue to be issued a $20 credit for executions of bond orders with an execution size of less than 20 bonds through December 31, 2009. In order for liquidity providers to be eligible to receive this $20 credit, the original and/or residual order posted by the liquidity provider must be for 20 bonds or more. For example, if a liquidity provider posts an order for 100 bonds and a contra side order comes in for 50 bonds, the liquidity provider will not receive a $20 credit. However, if a contra side order comes in for 10 bonds against the liquidity provider's current posted order of 100 bonds, the liquidity provider will receive a credit of $20 from the Exchange for that execution.

NYSE Bonds, which was implemented in April 2007, will continue to update its functionality to provide competitive bond trading for customers. The Exchange believes that this $20 credit will continue to incentivize liquidity providers to display the best price available on NYSE Bonds.

Additionally, the Exchange seeks to clarify the language in the fee schedule by replacing the word ''order'' with ''execution.'' The Exchange is not billing liquidity takers on the orders but rather the executions of those orders. Accordingly, the Exchange has proposed to amend the fee schedule to clarify the current language in the fee schedule.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act[5] in general and furthers the objectives of Section 6(b)(4) of the Act[6] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and subparagraph (f)(2) of Rule 19b–4 thereunder.[8] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2008–136 on the subject line.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(2).

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2008–136. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2008–136 and should be submitted on or before January 28, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E9–3 Filed 1–6–09; 8:45 am]

BILLING CODE 8011–01–P

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59178; File No. SR–NYSE–2008–137]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Pilot Program That Offers Liquidity Takers a Reduced Transaction Fee Structure for Certain Bond Trades Executed on the NYSE Bonds System

December 30, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 22, 2008, the New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NYSE. The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the pilot program that offers liquidity takers a reduced transaction fee structure for certain bond trades executed on the NYSE Bonds℠ system (''NYSE Bonds'') to December 31, 2009. The Exchange also seeks to make technical amendments to the fee schedule.

The text of the proposed rule change is available at NYSE, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NYSE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NYSE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to extend the pilot program that offers liquidity takers a reduced transaction fee structure for certain bond trades executed on the NYSE Bonds℠ system (''NYSE Bonds'') to December 31, 2009.

The Exchange's pilot program reduces transaction fees charged to liquidity takers for transactions executed on NYSE Bonds with a staggered transaction fee schedule based on the number of bonds purchased or sold in excess of ten (10) bonds. Currently, the transaction fee for orders that take liquidity from the market is $.50 per bond. This fee remains unchanged for orders up to ten (10) bonds. The extended fee filing pilot program provides for the following transaction fee schedule: (1) When the liquidity taker purchases or sells from one to ten (10) bonds, the Exchange will charge an execution fee of $0.50 per bond; (2) when the liquidity taker purchases or sells from eleven (11) to twenty-five (25) bonds, the Exchange will charge an execution fee of $0.20 per bond, and (3) when the liquidity taker purchases or sells twenty-six (26) bonds or more, the Exchange will charge an execution fee of $0.10 per bond.

For example, if a liquidity taker purchases or sells five (5) bonds, the Exchange will charge $.50 per bond, or a total of $2.50 for execution fees. If a liquidity taker purchases or sells twenty (20) bonds, the Exchange will charge $.20 per bond or a total of $4.00 for execution fees. If a liquidity taker purchases or sells thirty (30) bonds, the Exchange will charge $.10 per bond or a total of $3.00 for execution fees.

The Exchange will impose a $100 execution fee cap per transaction.

Additionally, the Exchange seeks to clarify the language in the fee schedule by replacing the word ''order'' with ''execution.'' The Exchange is not charging liquidity takers for these orders but rather will be charging for the executions of those orders. Accordingly, the Exchange has proposed to amend the fee schedule to clarify the current language in the fee schedule.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

the provisions of Section 6 of the Act[5] in general and furthers the objectives of Section 6(b)(4) of the Act[6] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and subparagraph (f)(2) of Rule 19b–4 thereunder.[8] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2008–137 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2008–137. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2008–137 and should be submitted on or before January 28, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E9–4 Filed 1–6–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59185; File No. SR–NYSE–2008–141]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Extend the Pilot Period for the NYSE Realtime Reference Prices Pilot Program

December 30, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 29, 2008, the New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NYSE proposes to extend the expiration date of its pilot program for the NYSE Realtime Reference Prices service until March 31, 2009. There is no new rule text.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In File No. SR–NYSE–2007–04, the Exchange established a pilot program that allows the Exchange to test the viability of a new NYSE-only market data service that allows a vendor to redistribute on a real-time basis last sale prices of transactions that take place on the Exchange (''NYSE Realtime Reference Prices'') and to establish a flat monthly fee for that service. The Commission approved that pilot program on June 16, 2008.[3]

The Exchange intends for the NYSE Realtime Reference Prices service to accomplish three goals:

---

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(2).

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57966 (June 16, 2008), 73 FR 35182 (June 20, 2008) (SR–NYSE–2007–04).

1. To provide a low-cost service that will make real-time prices widely available to millions of casual investors;

2. To provide vendors with a real-time substitute for delayed prices; and

3. To relieve vendors of administrative burdens.

This pilot program is similar to pilot programs that the Nasdaq Stock Market, Inc.[4] and NYSE Arca, Inc.[5] have established.

The pilot program allows internet service providers, traditional market data vendors, and others to make available NYSE Realtime Reference Prices on a real-time basis.[6] The NYSE Realtime Reference Price information includes last sale prices for all securities that trade on the Exchange. It includes only prices, and not the size of each trade and not bid/asked quotations.

It features a flat, fixed monthly vendor fee, no user-based fees, no vendor reporting requirements, and no professional or non-professional subscriber agreements.

The Exchange established November 1, 2008 as the end date for the pilot program. The Exchange then extended that end date to December 31, 2008.[7] The Exchange now seeks to extend that end date to March 31, 2009. Prior to the end of the pilot period, the Exchange will assess its experience with the product and either will submit a proposed rule change that seeks to extend or modify the pilot program or to make it permanent, or it will announce publicly that it does not seek to extend the pilot program beyond the program's termination date.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(4)[8] that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities and the requirements under Section 6(b)(5)[9] that the rules of an exchange be designed to promote just and equitable principles of trade and not to permit unfair discrimination between customers, issuers, brokers or dealers.

The Exchange believes that the pilot program benefits investors by facilitating their prompt access to widespread, free, real-time pricing information contained in the NYSE Realtime Reference Prices service. Extending the pilot program will extend those benefits while the Exchange assesses the service.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that this proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2008–141 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2008–141. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site *(http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2008–141 and should be submitted on or before January 27, 2009.

IV. Commission's Findings and Order Granting Accelerated Approval of a Proposed Rule Change

The Commission finds that the proposed rule change, to extend the pilot program for three months, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[10] In particular, it is consistent with Section 6(b)(4) of the Act,[11] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities, and Section 6(b)(5) of the Act,[12] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also finds that the proposed rule change is consistent with the provisions of Section 6(b)(8) of the Act,[13] which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Finally, the Commission finds that the proposed rule change is consistent with Rule 603(a) of Regulation NMS,[14] adopted under Section 11A(c)(1) of the Act,

[4] *See* Securities Exchange Act Release Nos. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR–NASDAQ–2006–060); 57973 (June 16, 2008), 73 FR 35430 (June 23, 2008) (SR–NASDAQ–2008–050).

[5] *See* Securities Exchange Act Release No. 58444 (August 29, 2008), 73 FR 51872 (September 5, 2008) (SR–NYSEArca–2008–96).

[6] The Exchange notes that it will make the NYSE Realtime Reference Prices available to vendors no earlier than it makes those prices available to the processor under the CTA Plan.

[7] *See* Securities Exchange Act Release No. 58893 (October 31, 2008), 73 FR 66093 (November 6, 2008) (SR–NYSE–2008–113).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78f(b)(5).

[10] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78f(b)(4).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78f(b)(8).

[14] 17 CFR 242.603(a).

which requires an exclusive processor that distributes information with respect to quotations for or transactions in an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.[15]

The Commission approved the fee for NYSE Realtime Reference Prices for a pilot period which runs until December 31, 2008.[16] The Commission notes that the Exchange proposes to extend the pilot program for three months. The Exchange proposes no other changes to the existing pilot program.

On December 2, 2008, the Commission issued an approval order (''Order'') that sets forth a market-based approach for analyzing proposals by self-regulatory organizations to impose fees for ''non-core'' market data products, such as NYSE Realtime Reference Prices.[17] The Commission believes that NYSE's proposal to temporarily extend the pilot program is consistent with the Act for the reasons noted in the Order.[18] The Commission believes that approving NYSE's proposal to temporarily extend the pilot program that imposes a fee for NYSE Realtime Reference Prices for an additional three months will be beneficial to investors and in the public interest, in that it is intended to allow continued broad public dissemination of increased real-time pricing information. In addition, extending the pilot program for an additional three months will allow NYSE, consistent with its representation,[19] to file, the public to comment on, and the Commission to analyze consistent with the Order and in light of Section 19(b) of the Act, a proposal to permanently approve the fee for NYSE Realtime Reference Prices.

The Commission finds good cause for approving the proposed rule change before the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Accelerating approval of this proposal is expected to benefit investors by continuing to facilitate their access to widespread, free, real-time pricing information contained in NYSE Realtime Reference Prices. Therefore, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,[20] to approve the proposed rule change on an accelerated basis to extend the operation of the pilot until March 31, 2009.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–NYSE–2008–141) is hereby approved on an accelerated basis until March 31, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E9–9 Filed 1–6–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59176; File No. SR–NYSEALTR–2008–20]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Alternext U.S. LLC Extending the Implementation of the NYSE Alternext Book Clerk Program From January 1, 2009 Through March 31, 2009

December 30, 2008.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 29, 2008, NYSE Alternext U.S. LLC (the ''Exchange'' or ''NYSE Alternext'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by NYSE Alternext. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the implementation of the NYSE Alternext Book Clerk program from January 1, 2009 through March 31, 2009.

The text of the proposed rule change is available at *http://www.nyse.com*, NYSE Alternext, and the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Commission previously approved a proposed rule change by the American Stock Exchange (''Amex''), the predecessor of the Exchange before Amex's acquisition by NYSE Euronext, Inc. on October 1, 2008 (the ''Acquisition''), to (1) Eliminate the obligation and ability of an Amex options specialist to act as an agent in connection with orders in his or her assigned options classes, (2) establish an Amex Book Clerk (now NYSE Alternext Book Clerk) program (''ABC program'') to designate unaffiliated persons responsible for operating and maintaining the customer limit order book and effecting proper executions, and (3) amending certain Amex rules relating to the operation of the ABC program.[4]

Exchange Rule 995–ANTE originally provided that the roll-out of the ABC program would occur over a six-month period ending on May 1, 2008. On May 1, 2008, Amex filed a proposal to extend the roll-out of the ABC program from May 2, 2008 through December 31, 2008, and that proposal was designated by the Commission as operative upon filing.[5] Due to integration activities subsequent to the Acquisition, the Exchange seeks an additional extension of the roll-out period from January 1,

---

[15] NYSE is an exclusive processor of its last sale data under Section 3(a)(22)(B) of the Act, 15 U.S.C. 78c(a)(22)(B), which defines an exclusive processor as, among other things, an exchange that distributes data on an exclusive basis on its own behalf.

[16] *See supra* notes 3 and 7. NYSE reduced the flat monthly fee for NYSE Realtime Reference Prices from $100,000 per month to $70,000 per month. *See* Securities Exchange Act Release No. 58443 (August 29, 2008), 73 FR 52436 (September 9, 2008) (SR–NYSE–2008–79).

[17] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data).

[18] *See supra* notes 3 and 7.

[19] The Exchange represents that it intends to file a proposal seeking permanent approval of NYSE Realtime Reference Prices. Telephone conversation between Ronald Jordan, Executive Vice President, Market Data Services, NYSE Euronext, and John Roeser, Assistant Director, Division of Trading and Markets, Commission, on December 30, 2008.

[20] 15 U.S.C. 78s(b)(2).

[21] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 56804 (November 16, 2007), 72 FR 66002 (November 26, 2007) (SR–Amex–2006–107) (''ABC Proposal'').

[5] *See* Securities Exchange Act Release No. 57770 (May 2, 2008), 73 FR 26452 (May 9, 2008) (SR–Amex–2008–37).

2009 through March 31, 2009. The Exchange submits that complexities associated with the aforementioned integration activities, including plans to replace the Exchange's current technology with NYSE Arca electronic trading technology and to move the Exchange's trading floor operations to a new options trading floor located at 11 Wall Street in February 2009, have caused a delay in the revised ABC program roll-out schedule. The Exchange believes that an extension of the roll-out period of the ABC program through March 31, 2009 will allow the Exchange sufficient time to resolve the integration activity that has delayed completion of the roll-out.

As set forth in the ABC Proposal and Amex Regulatory Circular 2008–03 (January 23, 2008), during the roll-out period, options specialists who continue to operate the customer limit order book will continue to be subject to the same agency obligations as are currently provided under Exchange Rules 950–ANTE(l) and 958–ANTE(e).

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[6] of the Securities Exchange Act of 1934 (the ''Act''), in general, and furthers the objectives of Section 6(b)(5)[7] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. Additionally, the proposed rule change is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

More specifically, the Exchange believes that extending the completion date for the roll-out of the ABC program will allow the Exchange to keep its primary focus on transitioning options trading to the NYSE Arca electronic trading technology. This technology update will provide the Exchange's options traders with a faster, more transparent marketplace with greater capacity, thereby contributing to perfecting the mechanism of a free and open market and a national market system, and which is also consistent with the protection of investors and the public interest.[8]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms, does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing.[11] However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. NYSE Alternext requested that the Commission waive the 30-day operative delay, as specified in Rule 19b–4(f)(6)(iii),[12] which would make the rule change effective and operative upon filing. The Exchange noted that this proposal merely extends the implementation date of the ABC program due to circumstances (*i.e.*, the Acquisition) that it did not foresee at the time the previous extension was granted.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to extend the roll-out of the ABC program without interruption.[13] In particular, prompt effectiveness of this extension will allow the Exchange to focus its resources on the integration activities resulting from the Acquisition and the upgrading of its options trading platforms. Therefore, the Commission designates the proposal operative upon filing.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[14]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEALTR–2008–20 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEALTR–2008–20. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] The Exchange notes that the new options trading platform will have functionality that is similar to the ABC program.

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to give the Commission notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 15 U.S.C. 78s(b)(3)(C).

Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEALTR–2008–20 and should be submitted on or before January 28, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E9–2 Filed 1–6–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59179; File No. SR–NYSEALTR–2008–16]

Self-Regulatory Organizations; NYSE Alternext U.S. LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Make Permanent the NYSE Alternext Bonds System Fee Schedule Which Is Currently Set To Expire on December 31, 2008 as Well as Make Technical Amendments to the Fee Schedule

December 30, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 24, 2008, NYSE Alternext U.S. LLC (''NYSEALTR'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NYSEALTR. The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b-4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to make permanent the NYSE Alternext Bonds System fee schedule which is currently set to expire on December 31, 2008 as well as make technical amendments to the fee schedule.

The text of the proposed rule change is available at NYSE Alternext, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NYSEALTR included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NYSEALTR has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE Alternext proposes to make permanent the NYSE Alternext Bonds System fee schedule which is currently set to expire on December 31, 2008 as well as make technical amendments to the fee schedule.

The Exchange recently filed a rule change that established, *inter alia,* the NYSE Alternext Bonds System fee schedule (''fee schedule'').[5] The fee schedule established execution fees per bond for orders that took liquidity from the NYSE Alternext Bonds Book. The fee schedule was structured to be similar to the NYSE Bonds Price List. The Exchange's reasoning for structuring the fee schedule in this fashion was because member organizations of NYSE Alternext that trade bonds and NYSE member organizations are member organizations of both exchanges. This dual membership structure allows all member organizations to trade on both exchanges and harmonizes the pricing structures of the two exchanges.

The Exchange is proposing a rule change to make the fee schedule permanent. At the time the fee schedule was first implemented as part of a larger NYSE Alternext filing (SR–NYSEALTR–2008–09), the Exchange inadvertently applied an expiration date of December 31, 2008 to the fee schedule which corresponded with the expiration of the NYSE Bonds pilot program for liquidity takers.[6] The Exchange intended to implement a permanent fee schedule for the NYSE Alternext Bonds System. Accordingly, the Exchange requests that the expiration date of December 31, 2008 be removed from the fee schedule.

Additionally, the Exchange seeks to clarify the language in the fee schedule by replacing the word ''order'' with ''execution.'' The Exchange is not billing liquidity takers on the orders but rather the executions of those orders. Accordingly, the Exchange has proposed to amend the fee schedule to clarify the current language in the fee schedule.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6[7] of the Securities Exchange Act of 1934 (the ''Act'')[8] in general and Section 6(b)(4) of the Act[9] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Exchange believes that the proposal does not constitute an inequitable allocation of dues, fees and other charges as the same fees will be charged to all member organizations.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

[15] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] *See* Securities Exchange Release No. 59045 (December 3, 2008), 73 FR 75151 (December 10, 2008) (SR–NYSEALTR–2008–09).

[6] *See* Securities Exchange Act Release No. 57823 (May 15, 2008), 73 FR 29804 (May 22, 2008) (SR–NYSE–2008–38).

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78a *et seq.*

[9] 15 U.S.C. 78f(b)(4).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and subparagraph (f)(2) of Rule 19b–4 thereunder.[11] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEALTR–2008–16 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEALTR–2008–16. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NYSEALTR. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEALTR–2008–16 and should be submitted on or before January 28, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E9–5 Filed 1–6–09; 8:45 am]

BILLING CODE 8011–01–P

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59180; File No. SR–NYSEArca–2008–121]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change Amending Rule 5.2(j)(6) To Increase the Permissible Aggregate Weight of Underlying Foreign Country Securities

December 30, 2008.

I. Introduction

On October 29, 2008, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca''), through its wholly owned subsidiary, NYSE Arca Equities, Inc. (''NYSE Arca Equities''), filed with the Securities and Exchange Commission (''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder[2] a proposed rule change amending NYSE Arca Equities Rule 5.2(j)(6) relating to the listing of Equity Index-Linked Securities.[3] The proposed rule change was published for comment in the **Federal Register** on November 28, 2008.[4] The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange's listing standards for Equity Index-Linked Securities, among other criteria, currently limit the permissible aggregate weight of underlying foreign country securities and American Depository Receipts (''ADRs'') that can be included in the Equity Reference Asset to 20% of the overall index where the primary trading markets of such foreign country securities or foreign country securities underlying such ADRs are not members of the Intermarket Surveillance Group (''ISG'') or parties to comprehensive surveillance sharing agreements (''CSSAs'') with the Exchange. The Exchange proposes to amend NYSE Arca Equities Rule 5.2(j)(6)(B)(I)(1)(b)(v) to increase the permissible aggregate weight of such underlying foreign country securities and ADRs up to 50% of the overall index, subject to certain other limitations.

Specifically, the proposal would permit the listing and trading of Equity Index-Linked Securities where the underlying foreign country securities and/or foreign country securities underlying ADRs primarily trading on non-U.S. markets that are not ISG members or otherwise subject to a CSSA agreement with the Exchange account for up to 50% of the aggregate dollar weight of the index, provided that: (1) The securities of any one primary foreign market which is not an ISG member or does not have a CSSA with the Exchange (''Non-Reciprocal Foreign Markets'') do not represent more than 20% of the dollar weight of the index; and (2) the securities of any two Non-Reciprocal Foreign Markets do not represent more than 33% of the dollar weight of the index. The Exchange also seeks to make technical and non-substantive modifications to NYSE Arca Equities Rule 5.2(j)(6)(B)(I)(1)(b)(v).

III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act [5] and the rules and regulations thereunder applicable to a national securities exchange.[6] In particular, the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Equity Index-Linked Securities are securities, the payment at maturity of which is based on the performance of an underlying index or indexes of equity securities (''Equity Reference Asset'').

[4] *See* Securities Exchange Act Release No. 58984 (November 20, 2008), 73 FR 72546.

[5] 15 U.S.C. 78f.

[6] In approving this proposed rule change, the Commission has considered the proposed rule's

Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[7] which requires that the rules of the Exchange be designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission believes that the proposal reasonably balances the removal of impediments to a free and open market with the protection of investors and the public interest, two principles set forth in Section 6(b)(5) of the Act. As a result of the proposal, the permissible percentage of underlying foreign country securities and/or foreign country securities underlying ADRs trading on foreign markets that are not ISG members or parties to a CSSA with the Exchange would be limited to 50% of the overall dollar weight of the index. The Commission believes that this portion of the proposal would permit increased flexibility with respect to listing and trading Equity Index-Linked Securities. At the same time, the proposed amendment also provides that the securities trading on: (1) Any one Non-Reciprocal Foreign Market must not constitute more than 20% of the overall dollar weight of the index; and (2) any two Non-Reciprocal Foreign Markets must not constitute more than 33% of the overall dollar weight of the index. These conditions establish concentration limits designed to ensure that a significant percentage of an underlying index is not composed of securities trading on any one or two Non-Reciprocal Foreign Markets. Additionally, in light of its proposed revision to the listing criteria for Equity Index-Linked Securities, the Exchange has renewed its representation that its surveillance procedures applicable to Equity Index-Linked Securities are adequate to detect and deter violations of its Rules and all applicable federal securities laws.[8]

The Commission also believes that the technical and non-substantive changes to NYSE Arca Equities Rule 5.2(j)(6)(B)(I)(1)(b)(v) clarify the format and application of the proposed amendment related to Equity Index-Linked Securities.

impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[7] 15 U.S.C. 78f(b)(5).

[8] *See* e-Mail from Tim Malinowski, Director, NYSE Euronext, to Christopher W. Chow, Special Counsel, Commission, dated December 23, 2008. *See also* Securities Exchange Act Release No. 56637 (October 10, 2007), 72 FR 58704, 58709 (October 16, 2007).

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[9] that the proposed rule change (SR–NYSEArca–2008–121) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E9–6 Filed 1–6–09; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59184; File No. SR–NYSEArca–2008–143]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Extend the Pilot Program for NYSE Arca Realtime Reference Prices Service

December 30, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 30, 2008, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the expiration date of its pilot program for the NYSE Arca Realtime Reference Prices service until March 31, 2009. There is no new rule text.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In File No. SR–NYSEArca–2008–96, the Exchange established a pilot program that allows the Exchange to test the viability of a new NYSE Arca-only market data service that allows a vendor to redistribute on a real-time basis last sale prices of transactions that take place on the Exchange (''NYSE Arca Realtime Reference Prices'') and to establish a flat monthly fee for that service. The Commission approved that pilot program on August 29, 2008.[3]

The Exchange intends for the NYSE Arca Realtime Reference Prices service to accomplish three goals:

1. To provide a low-cost service that will make real-time prices widely available to millions of casual investors;

2. To provide vendors with a real-time substitute for delayed prices; and

3. To relieve vendors of administrative burdens.

This pilot program is similar to pilot programs that the Nasdaq Stock Market, Inc. (''Nasdaq'')[4] and the New York Stock Exchange, LLC (''NYSE'')[5] have established.

The pilot program allows internet service providers, traditional market data vendors, and others (''NYSE Arca-Only Vendors'') to make available NYSE Arca Realtime Reference Prices on a real-time basis.[6] The NYSE Arca Realtime Reference Price information includes last sale prices for all securities that trade on the Exchange. It includes only prices, and not the size of each trade and not bid/asked quotations.

It features a flat, fixed monthly vendor fee, no user-based fees, no vendor reporting requirements, and no professional or non-professional subscriber agreements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 58444 (August 29, 2008), 73 FR 51872 (September 5, 2008) (SR–NYSEArca–2008–96).

[4] *See* Securities Exchange Act Release Nos. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR–NASDAQ–2006–060); 57973 (June 16, 2008), 73 FR 35430 (June 23, 2008) (SR–NASDAQ–2008–050).

[5] *See* Securities Exchange Act Release No. 57966 (June 16, 2008), 73 FR 35182 (June 20, 2008) (SR–NYSE–2007–04).

[6] The Exchange notes that it will make the NYSE Arca Realtime Reference Prices available to vendors no earlier than it makes those prices available to the processor under the CTA Plan.

The Exchange established November 1, 2008 as the end date for the pilot program. The Exchange then extended that end date to December 31, 2008.[7] The Exchange now seeks to extend that end date to March 31, 2009. Prior to the end of the pilot period, the Exchange will assess its experience with the product and either will submit a proposed rule change that seeks to extend or modify the pilot program or to make it permanent, or it will announce publicly that it does not seek to extend the pilot program beyond the program's termination date.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(4)[8] that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities and the requirements under Section 6(b)(5)[9] that the rules of an exchange be designed to promote just and equitable principles of trade and not to permit unfair discrimination between customers, issuers, brokers or dealers.

The Exchange believes that the pilot program benefits investors by facilitating their prompt access to widespread, free, real-time pricing information contained in the NYSE Arca Realtime Reference Prices service. Extending the pilot program will extend those benefits while the Exchange assesses the service.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that this proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2008–143 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2008–143. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2008–143 and should be submitted on or before January 28, 2009.

IV. Commission's Findings and Order Granting Accelerated Approval of a Proposed Rule Change

The Commission finds that the proposed rule change, to extend the pilot program for three months, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[10] In particular, it is consistent with Section 6(b)(4) of the Act,[11] which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities, and Section 6(b)(5) of the Act,[12] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also finds that the proposed rule change is consistent with the provisions of Section 6(b)(8) of the Act,[13] which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Finally, the Commission finds that the proposed rule change is consistent with Rule 603(a) of Regulation NMS,[14] adopted under Section 11A(c)(1) of the Act, which requires an exclusive processor that distributes information with respect to quotations for or transactions in an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.[15]

The Commission approved the fee for NYSE Arca Realtime Reference Prices for a pilot period which runs until December 31, 2008.[16] The Commission notes that the Exchange proposes to extend the pilot program for three months. The Exchange proposes no other changes to the existing pilot program.

On December 2, 2008, the Commission issued an approval order (''Order'') that sets forth a market-based approach for analyzing proposals by self-regulatory organizations to impose fees for ''non-core'' market data products, such as NYSE Arca Realtime Reference Prices.[17] The Commission believes that NYSE Arca's proposal to

[7] *See* Securities Exchange Act Release No. 58895 (October 31, 2008), 73 FR 66956 (November 12, 2008) (SR–NYSEArca–2008–122).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78f(b)(5).

[10] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78f(b)(4).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78f(b)(8).

[14] 17 CFR 242.603(a).

[15] NYSE Arca is an exclusive processor of its last sale data under Section 3(a)(22)(B) of the Act, 15 U.S.C. 78c(a)(22)(B), which defines an exclusive processor as, among other things, an exchange that distributes data on an exclusive basis on its own behalf.

[16] *See supra* notes 3 and 7.

[17] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data).

temporarily extend the pilot program is consistent with the Act for the reasons noted in the Order.[18] The Commission believes that approving NYSE Arca's proposal to temporarily extend the pilot program that imposes a fee for NYSE Arca Realtime Reference Prices for an additional three months will be beneficial to investors and in the public interest, in that it is intended to allow continued broad public dissemination of increased real-time pricing information. In addition, extending the pilot program for an additional three months will allow NYSE Arca, consistent with its representation,[19] to file, the public to comment on, and the Commission to analyze consistent with the Order and in light of Section 19(b) of the Act, a proposal to permanently approve the fee for NYSE Arca Realtime Reference Prices.

The Commission finds good cause for approving the proposed rule change before the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. Accelerating approval of this proposal is expected to benefit investors by continuing to facilitate their access to widespread, free, real-time pricing information contained in NYSE Arca Realtime Reference Prices. Therefore, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,[20] to approve the proposed rule change on an accelerated basis to extend the operation of the pilot until March 31, 2009.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–NYSEArca–2008–143) is hereby approved on an accelerated basis until March 31, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E9–8 Filed 1–6–09; 8:45 am]

BILLING CODE 8011–01–P

[18] *See supra* notes 3 and 7.

[19] The Exchange represents that it intends to file a proposal seeking permanent approval of NYSE Arca Realtime Reference Prices. Telephone conversation between Ronald Jordan, Executive Vice President, Market Data Services, NYSE Euronext, and John Roeser, Assistant Director, Division of Trading and Markets, Commission, on December 30, 2008.

[20] 15 U.S.C. 78s(b)(2).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59191; File No. SR–NYSEArca–2008–139]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NYSE Arca, Inc. Amending the Minor Rule Plan To Increase Certain Sanctions

December 31, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 17, 2008, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 10.12 Minor Rule Plan by increasing certain sanctions contained in the fine schedule. The Exchange also proposes to make minor technical changes at this time. A copy of this filing is available on the Exchange's Web site at *http://www.nyse.com,* at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Minor Rule Plan (''MRP'') fosters compliance with applicable rules and also helps to reduce the number and extent of rule violations committed by Options Trading Permit (''OTP'') Holders, OTP Firms and associated persons. The prompt imposition of a financial penalty helps to quickly educate and improve the conduct of OTP Holders, OTP Firms and associated persons that have engaged in inadvertent or otherwise minor violations of the Exchange's rules, particularly those who may not pay attention to mere warnings that they are violating Exchange rules. By promptly imposing a meaningful financial penalty for such violations, the MRP focuses on correcting conduct before it gives rise to more serious enforcement action.

Market Makers on NYSE Arca receive certain rights and privileges in return for meeting certain obligations. These obligations include adhering to certain rules regarding quoting, in-person trading requirements, and fulfilling the terms of a Market Maker Appointment.[3] Failure to comply with rules these governing Market Maker obligations may result in a fine pursuant to the MRP. At this time the Exchange feels the current monetary fine levels contained in the MRP, for violations of certain rules pertaining to Market Makers, are too low, given the serious nature of these rules. In order to act as an effective deterrent against future violations, while also serving as a just penalty for those who commit these violations, the Exchange proposes to raise the fine levels for violations related to certain rules governing Market Maker obligations. A brief description of each proposed change is shown below.

Rule 10.12(k)(i)25.

At least 75% of the trading activity of a Market Maker (measured in terms of contract volume per quarter) must be in classes within the Market Maker's Appointment. A failure to comply with the 75% contract volume requirement may result in a fine of $500.00 for a first offense, $1,000.00 for a second offense and $2,500.00 for a third offense. The Exchange proposes to raise these suggested fines to $1,000.00 for a first offense, $2,500.00 for a second offense and $3,500.00 for a third offense.

Rule 10.12(k)(i)26.

At least 60% of a Market Maker's transactions must be executed by the Market Maker in person or through an approved facility of the Exchange. A failure to comply with this 60% in-person trading requirement may result in a fine of $500.00 for a first offense, $1,000.00 for a second offense and $2,500.00 for a third offense. The Exchange proposes to raise these

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* NYSE Arca Rule 6.35—Appointment of Market Makers.

suggested fines to $1,000.00 for a first offense, $2,500.00 for a second offense and $3,500.00 for a third offense.

Rule 10.12(k)(i)37.

Market Makers on NYSE Arca must apply for an appointment in one or more classes of option contracts. A Market Maker who fails to apply for an Appointment may be subject to a fine of $500.00 for a first offense, $1,000.00 for a second offense and $1,500.00 for a third offense. The Exchange proposes to raise these suggested fines to $1,000.00 for a first offense, $2,500.00 for a second offense and $3,500.00 for a third offense.

Rule 10.12(k)(i)39.

Market Makers, including Lead Market Makers, have certain obligations pertaining to quotes and quoting, which are governed by Rule 6.37B. Market Makers or Lead Market Makers who fail to comply with the Quotation Requirements of Rule 6.37B may be subject to a fine of $500.00 for a first offense, $1,000.00 for a second offense and $2,500.00 for a third offense. The Exchange proposes to raise these suggested fines to $1,000.00 for a first offense, $2,500.00 for a second offense and $3,500.00 for a third offense.

Rule 10.12(k)(i)41.

Market Makers are required to provide accurate quotes, and quote markets within the maximum quote spread differentials prescribed in Rule 6.37. Market Makers who fail to provide accurate quotes within the maximum quote spread differentials may be subject to a fine of $500.00 for a first offense, $1,000.00 for a second offense and $2,000.00 for a third offense. The Exchange proposes to raise these suggested fines to $1000.00 for a first offense, $2,500.00 for a second offense and $3,500.00 for a third offense.

Other Minor Changes

Rule 10.12(h)(25) deals with a failure to meet a 75% Primary Appointment requirement for Market Makers and cites Rules 6.35 Commentary .03 and 6.37(h)(5). The 75 percent Appointment requirement is actually governed by Rule 6.35(i). The Exchange proposes to make a change so that the correct rule number is properly referenced. A similar change is proposed for the corresponding fine schedule in Rule 10.12(k)(i)25.

Rule 10.12(h)(41) deals with Market Makers who fail to quote markets within the maximum quote spread differentials or who fail to disseminate quotes accurately and cites only Rules 6.37(b)(1) and 6.82(c)(1). However, Rule 6.37A(b) also deals with maximum quote spread differentials, and was inadvertently left out of the MRP. It has always been the intent of the Exchange to have violations of Market Maker quoting obligations eligible for disposition under the MRP. This rule change simply serves to add the previously omitted rule citation at this time. A similar change is proposed for the corresponding fine schedule in Rule 10.12(k)(i)41.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[4] of the Securities Exchange Act of 1934 (the ''Act''), in general, and furthers the objectives of Section 6(b)(5)[5] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The proposal is also consistent with Section 6(b)(6)[6] and 6(b)(7),[7] which requires that members and persons associated with members are appropriately disciplined for violations of Exchange rules and are provided a fair procedure for disciplinary procedures.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which Amex consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2008–139 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2008–139. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2008–139 and should be submitted on or before January 28, 2009.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78f(b)(6).

[7] 15 U.S.C. 78f(b)(7).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E9–16 Filed 1–6–09; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice 6474]

Culturally Significant Objects Imported for Exhibition Determinations: ''Becoming Edvard Munch: Influence, Anxiety, and Myth''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects in the exhibition: ''Becoming Edvard Munch: Influence, Anxiety, and Myth,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Art Institute of Chicago, Chicago, IL, from on or about February 14, 2009, until on or about April 26, 2009, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: (202–453–8050)). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: December 30, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E9–54 Filed 1–6–09; 8:45 am]

BILLING CODE 4710–05–P

[8] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 6475]

Culturally Significant Objects Imported for Exhibition Determinations: ''Cast in Bronze: French Sculpture From Renaissance to Revolution''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects in the exhibition: ''Cast in Bronze: French Sculpture from Renaissance to Revolution,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Metropolitan Museum of Art, New York, NY, from on or about February 24, 2009, until on or about May 24, 2009; The J. Paul Getty Museum, Los Angeles, CA, from on or about June 30, 2009, until on or about September 27, 2009, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: (202–453–8050). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: December 30, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E9–55 Filed 1–6–09; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 6473]

Culturally Significant Objects Imported for Exhibition Determinations: ''Endless Forms'': Charles Darwin, Natural Science and the Visual Arts

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects in the exhibition: ''Endless Forms'': Charles Darwin, Natural Science and the Visual Arts, imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Yale Center for British Art, New Haven, CT, from on or about February 12, 2009, until on or about May 3, 2009, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: (202–453–8050)). The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

December 30, 2008.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E9–56 Filed 1–6–09; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending November 28, 2008

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2008–0368.

Date Filed: November 25, 2008.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: December 16, 2008.

Description: Application of Ocean Sky (UK) Limited requesting an exemption and a foreign air carrier permit to conduct: (i) Foreign charter air transportation of persons, property and mail from any point or points behind any Member State and via intermediate points, to any point or points in the United States and beyond; (ii) foreign charter air transportation of persons, property and mail between any point or points in the United States and any point or points in any member of the European Common Aviation Area; (iii) foreign charter air transportation of cargo between any point or points in the United States and any other point or points; (iv) other charters pursuant to the prior approval requirements; and (v) charter transportation authorized by any additional route rights made available to European Community carriers in the future, to the extent permitted by the Applicant's homeland license on file with the Department.

Barbara J. Hairston,

Supervisory Dockets Officer, Alternate Federal Register Liaison.

[FR Doc. E9–14 Filed 1–6–09; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending November 28, 2008

The following Agreements were filed with the Department of Transportation under the sections 412 and 414 of the Federal Aviation Act, as amended (49 U.S.C. 1383 and 1384) and procedures governing proceedings to enforce these provisions. Answers may be filed within 21 days after the filing of the application.

Docket Number: DOT–OST–2008–0367.

Date Filed: November 25, 2008.

Parties: Members of the International Air Transport Association.

Subject: Composite Passenger Tariff Coordinating Conference, Composite Resolution 002bk, (Memo 1510), Minutes: Composite Meeting of Passenger Tariff, Coordinating Conference, (Memo 1494), Intended effective date: 1 April 2009.

Barabra J. Hairston,

Supervisory Dockets Officer, Alternate Federal Register Liaison.

[FR Doc. E9–18 Filed 1–6–09; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2008–0189]

Emergency Temporary Closure of I–395 & I–695 Southeast and Southwest Highway in the District of Columbia

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Announcement for the District of Columbia to temporarily close the SE/SW Highway (I–395 & I–695), on January 20, 2009, for safety and security purposes for the Inauguration of the President of the United States.

SUMMARY: Pursuant to section 658.11(e) of title 23, Code of Federal Regulations, the Washington, DC Department of Transportation (DDOT) has requested approval of a plan to temporarily close segments of the Interstate to all traffic except motor coaches and buses—I–395 (from the 14th Street Bridge to New York Avenue), I–695 (from the 3rd Street Tunnel to the 11th Street Bridges), and I–295 (from I–695 to DC–295)—on January 20, 2009, beginning at 12 a.m., for one consecutive 24-hour period, because of the Presidential Inauguration. I–395 would be closed to general purpose traffic at New York Avenue up to the 14th Street Bridge. I–695 would be closed to general purpose traffic at the 11th Street Bridges. I–295 would be closed to general purpose traffic at Pennsylvania Avenue. The request has been made for the purposes of safety and security in and around the Capitol Building as well as for the critically needed space to park a portion of the expected 10,000 buses bringing people into the Washington area on January 20th. The Interstate routes included in the request are part of the National Network of highways that can safely and efficiently accommodate the large vehicles authorized by provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended, designated in accordance with 23 CFR Part 658 and listed in Appendix A. This regulation limits the authority of the States to restrict the access of these commercial motor vehicles to the designated National Routes, and requires the approval of the FHWA for additions, deletions, exceptions and restrictions in accordance with 23 CFR 658.11. The FHWA has decided to approve the request by the DDOT as an emergency deletion in accordance with section 658.11(e) due to the safety considerations discussed in this notice. The FHWA is requesting comments from the general public on this determination. Under title 23 of the Code of Federal Regulations, section 658.11 (Additions, deletions, exceptions, and restrictions), the FHWA can grant the closing of the Interstate system or other National Network route based upon specified justification criteria in section 658.11(d)(2). The FHWA is also authorized to delete any route from the National Network on an emergency basis based on safety considerations pursuant to section 658.11(e). These emergency deletions are published in the **Federal Register** for notice and comment.

DATES: Comments must be received on or before January 16, 2009.

ADDRESSES: The letter of request along with justifications can be viewed electronically at the docket established for this rulemaking at *http://www.regulations.gov*. Hard copies of the documents will also be available for viewing at the DOT address listed below.

Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or submit comments electronically at *http://www.regulations.gov*, or fax comments

to (202) 493–2251. Alternatively, comments may be submitted via the Federal eRulemaking Portal at *http://www.regulations.gov* (follow the on-line instructions for submitting comments). All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m. to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or you may print the acknowledgment page that appears after submitting comments electronically. All comments received into any docket may be searched in electronic format by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). Persons making comments may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, Pages 19477–78), or you may view the statement at *http://dms.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Mr. Michael P. Onder, Team Leader Truck Size and Weight and Freight Operations and Technology Team, (202) 366–2639, Raymond W. Cuprill, Office of the Chief Counsel, (202) 366–0791, Federal Highway Administration; 1200 New Jersey Avenue, SE., Washington, DC 20590, and Mr. Mark Kehrli, FHWA Division Administrator—Washington, DC, (202) 219–3536. Office hours for the FHWA are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

You may submit or retrieve comments online through the Federal eRulemaking portal at: *http://www.regulations.gov*. The Web site is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded from the Office of the Federal Register's home page at: *http://www.archives.gov/federal_register* and the Government Printing Office's Web page at: *http://www.gpoaccess.gov*.

Background

On January 20, 2009, as a result of the inauguration activities, the number of participants and spectators is expected to reach 2–4 million, overwhelming both the roadway and transit networks in the District of Columbia and will create a safety hazard for commercial traffic to traverse these routes during that time. This is one of the principal reasons for the closure of these routes to commercial traffic. Additionally, preliminary data indicates that approximately 10,000 or more motor coaches within a 1,000-mile radius of the District of Columbia are expected to travel to the District. As such, safety in normal transport and in the event of emergency evacuation requires creating transportation redundancy. That redundancy can best be created by allowing arrivals by motor coach to proceed directly (without transfer to transit or another vehicle) to the inaugural checkpoint areas and then by allowing the motor coaches to park within walking distance of the drop-off location. The identified segments of I–395/I–295/I–695, if temporarily restricted to prohibit general purpose traffic, provides the best and only feasible location for allowing large numbers of motor coaches to approach the departure from the inauguration and the subsequent parade while providing the possibility of expedited departures in the event of an emergency.

Temporary closure of these segments of the Interstate to general purpose traffic means that the motor coaches can be moved in and out with maximum safety while providing the possibility of expedited departures in the event of an emergency. Temporary closure of these segments of Interstate to general purpose traffic also facilitates the movement of emergency vehicles into and out of the area, thereby enhancing safety. To further enhance safety, the motor coaches will be parked in the roadway approach spans, beyond the bridge limits. This will minimize bridge overloading and ensure routes for pedestrian traffic and emergency vehicles.

The temporary closure should have no impact on Interstate commerce. I–95, which is the main north-south Interstate route in the region, is signed around the Washington Beltway (I–495) so that Interstate traffic need not enter the District at all. Likewise, Interstate traffic seeking to go west via I–66 or I–270 can access either I–66 or I–270 via I–495 without ever entering the District. Likewise, traffic seeking to go east via U.S. Route 50 can access U.S. Route 50 via I–495 without ever entering the District.

Commercial motor vehicles, of the dimensions and configurations described in 23 CFR 658.13 and 658.15, serving the area can utilize the routes listed above in response to 23 CFR 658.11(d)(2)(ii). Vehicles serving the immediate area north of the temporarily restricted I–395/I–295/I–695 segments of the Interstate will be unable to do so because the local and National Highway System (NHS) street network will also be closed during the inauguration. Therefore, the closure of the I–395/I–295/I–695 segments of the Interstate will have no material effect on such traffic. Entities requiring deliveries within and adjacent to the area of closed local and NHS streets will be encouraged to receive deliveries before or after January 20th. To assist in facilitating Interstate commerce, the DDOT and other District government agencies will coordinate with local governments and adjacent jurisdictions (*i.e.*, VA and MD) to minimize traffic disruptions. Requests will be made for adjacent jurisdictions to cooperate in routing traffic around the closure and warn Interstate traffic of the closure by signs, and other means to get the message out to the trucking industry and the rest of the traveling public.

Authority: 23 U.S.C. 127, 315 and 49 U.S.C. 31111, 31112, and 31114; 23 CFR Part 658.

Issued on: December 31, 2008.

Thomas J. Madison, Jr.,

Federal Highway Administrator.

[FR Doc. E8–31472 Filed 1–6–09; 8:45 am]

BILLING CODE 4910–22–P

Federal Register

Wednesday,
January 7, 2009

Part II

Office of Management and Budget

2007 North American Industry Classification System (NAICS)—Updates for 2012; Notice

OFFICE OF MANAGEMENT AND BUDGET

2007 North American Industry Classification System (NAICS)—Updates for 2012

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Notice of Solicitation for Proposals to Revise Portions of NAICS for 2012.

SUMMARY: Under the authority of the Budget and Accounting Procedures Act of 1950 (31 U.S.C. 1104(d)) and 44 U.S.C. 3504(e), the Office of Management and Budget, through the Economic Classification Policy Committee (ECPC), is soliciting proposals from the public for changes to the North American Industry Classification System (NAICS) structure and content to be included in a potential 2012 revision. The ECPC is also seeking public input on several clarifications to the existing classification system (please see Parts I–VI in the **SUPPLEMENTARY INFORMATION** section, below). The clarifications relate to ongoing changes in how businesses organize and structure themselves to efficiently provide goods and services in the economy.

In Part I, the ECPC provides background on the NAICS classification system. In Part II, the ECPC is soliciting public comments on the advisability and desirability of reducing national industry detail in the manufacturing sector during a 2012 revision of NAICS. Part III includes a solicitation of proposals for new and emerging industries. Part IV presents notification of a method to publicize corrections for errors and omissions that are identified in NAICS 2007. Part V solicits public comments on the classification of distribution centers, logistics service providers, and sales offices of publishers within NAICS. Part VI solicits public comments and suggestions to clarify the classification of establishments that outsource manufacturing transformation activities and provide manufacturing services in the market given the increasing specialization and globalization of business activities in the economy.

In soliciting comments about revising NAICS, the ECPC does not intend to open the entire classification for substantial change in 2012. The ECPC will consider public comments and proposals for changes or modifications that advance the goals of NAICS. The ECPC is also seeking and will consider comments related to consistent classification in an era of greater specialization and globalization.

DATES: To ensure consideration of your comments or proposals related to the potential revision of NAICS for 2012 detailed in this notice, comments must be in writing and received no later than April 7, 2009. Please be aware of delays in mail processing at Federal facilities due to tightened security. Respondents are encouraged to send both a hard copy and a second copy via fax or e-mail.

ADDRESSES: Correspondence concerning the ECPC intent to review and possibly revise NAICS for 2012, comments on the business organization clarifications, and all proposals for new industries in NAICS for 2012 should be sent to John Murphy, Chair, Economic Classification Policy Committee, Bureau of the Census, Room 8K157, Washington, DC 20233–6500. Responses may also be submitted by e-mail to *John.Burns.Murphy@census.gov* or by fax at (301) 763-8636. Mr. Murphy can be reached at (301) 763–5172.

Comments may also be sent via *http://www.regulations.gov*—a Federal E-Government Web site that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type ''NAICS for 2012'' (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments.

All comments regarding this notice received via the Web site, e-mail, fax, hardcopy, or other means, are part of the public record as submitted. For this reason, do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information.

Please consider including contact information and a phone number or e-mail address with your comments to facilitate follow-up if necessary.

Electronic Availability: This document is available on the Internet from the Census Bureau Internet site at *http://www.census.gov/naics.* This WWW page contains previous NAICS United States **Federal Register** notices, ECPC Issues Papers, ECPC Reports, the current structure of NAICS United States 2007, and related documents.

Public Review Procedure: All comments and proposals received in response to this notice will be available for public inspection at the Bureau of the Census, Suitland, Maryland. Please telephone the Census Bureau at (301) 763–5172 to make an appointment to enter the Federal Center. OMB will publish all ECPC recommendations for changes to NAICS for 2012 resulting from this notice in the **Federal Register** for review and comment prior to final action.

FOR FURTHER INFORMATION CONTACT: John Murphy, Chair, Economic Classification Policy Committee, Bureau of the Census, Room 8K157, Washington, DC 20233–6500. Mr. Murphy can be reached at (301) 763–5172, by fax at (301)763–8636, or by e-mail at *John.Burns.Murphy@census.gov.*

SUPPLEMENTARY INFORMATION: The **SUPPLEMENTARY INFORMATION** section of this notice is divided into six parts. Part I provides background on NAICS 2007; Part II solicits views regarding the advisability of reducing industry detail in the manufacturing sector; Part III includes a solicitation for proposals for new and emerging industries; Part IV notifies the public of the location where corrections of identified errors or omissions in NAICS 2007 will be publicized; Part V requests public input on the classification of distribution centers, logistics service providers, and sales offices of publishers; and Part VI solicits public comment and proposals for the classification of establishments that outsource manufacturing transformation activities in light of increasing specialization and globalization.

Part I: Background of NAICS 2007

NAICS is a system for classifying establishments (individual business locations) by type of economic activity. Its purposes are: (1) To facilitate the collection, tabulation, presentation, and analysis of data relating to establishments; and (2) to promote uniformity and comparability in the presentation and analysis of statistical data describing the North American economy. NAICS is used by Federal statistical agencies that collect or publish data by industry. It is also widely used by State agencies, trade associations, private businesses, and other organizations.

Mexico's Instituto Nacional de Estadística, Geografiía Informática (INEGI), Statistics Canada, and the United States Office of Management and Budget (OMB), through its Economic Classification Policy Committee (ECPC), collaborated on NAICS to make the industry statistics produced by the three countries comparable. NAICS is the first industry classification system developed in accordance with a single principle of aggregation, the principle that producing units that use similar production processes should be grouped together in the classification. NAICS also reflects in a much more explicit way the enormous changes in

technology and in the growth and diversification of services that have marked recent decades. Industry statistics presented using NAICS are comparable, to a large extent, with statistics compiled according to the latest revision of the United Nations' International Standard Industrial Classification (ISIC, Revision 4).

For the three countries, NAICS provides a consistent framework for the collection, tabulation, presentation, and analysis of industry statistics used by government policy analysts, by academics and researchers, by the business community, and by the public.

The four principles that guided the initial development of NAICS were:

(1) NAICS is erected on a production-oriented conceptual framework. This means that producing units that use the same or similar production processes are grouped together in NAICS.

(2) NAICS gives special attention to developing production-oriented classifications for (a) new and emerging industries, (b) service industries in general, and (c) industries engaged in the production of advanced technologies.

(3) Time series continuity is maintained to the extent possible.

(4) The system strives for compatibility with the two-digit level of the International Standard Industrial Classification of All Economic Activities (ISIC Rev. 3) of the United Nations.

The ECPC is committed to maintaining the principles of NAICS as it develops further refinements. NAICS uses a hierarchical structure to classify establishments from the broadest level to the most detailed level using the following format:

Sector	2-digit	Sectors represent the highest level of aggregation. There are 20 sectors in NAICS representing broad levels of aggregation.
Subsector	3-digit	Subsectors represent the next, more detailed level of aggregation in NAICS. There are 99 subsectors in NAICS.
Industry Group	4-digit	Industry groups are more detailed than subsectors. There are 313 Industry groups in NAICS.
NAICS Industry	5-digit	NAICS industries are the level that, in most cases, represents the lowest level of three country comparability. There are 721 five-digit industries in NAICS.
National Industry	6-digit	National industries are the most detailed level of NAICS. These industries represent the national level detail necessary for economic statistics in an industry classification. There are 1175 U.S. industries in NAICS United States, 2007.

The implementation of the first vintage of NAICS—NAICS 1997—affected almost half of the industries that were available for use under the 1987 Standard Industrial Classification (SIC). Subsequent NAICS revisions in 2002 and 2007 were more modest. Complete details of those revisions were published in the **Federal Register**. Revisions for 2002 were published on April 20, 2000 (65 FR 21242–21282), and the revisions for 2007 were published on March 16, 2006 (71 FR 28532–28533).

The development of NAICS represented a significant improvement over the previous classification systems used in North America. To ensure the accuracy, timeliness, and relevance of the classification, NAICS is reviewed every five years to determine what, if any, changes are required. The ECPC recognizes the costs involved when implementing industry classification revisions in statistical programs and the costs for data users when there are disruptions in the comparability of data. The ECPC also recognizes the economic, statistical, and policy implications that arise when the industry classification system does not identify and account for important economic developments. Balancing the costs of change against the potential for more accurate and relevant economic statistics requires significant input from data producers, data providers, and data users.

Part II. Detail in the Manufacturing Sector of NAICS United States 2007

NAICS is the Federal standard used to produce government economic statistics. Its structure and detail must be appropriate for large-scale programs, such as economic censuses or censuses of employment and wages as well as for sample survey programs of smaller size or more frequent periodicity. The greater the number of industries included in these surveys, the greater their costs in terms of reporting burden imposed on respondents and in terms of the resources used to collect, collate, and disseminate the individual industry data. The manufacturing sector of NAICS United States 2007 contains 472 six-digit industries. Of these, 407 are national level detail that is used only in the United States. In 2003, to reduce both respondent burden and production costs, the Annual Survey of Manufactures (ASM) produced by the U.S. Census Bureau collapsed separate industry data for 239 six-digit industries into higher level aggregates. (The details are available at *http://www.census.gov/mcd/asmind/*.)

While the ECPC recognizes that the loss of some level of detail in manufacturing will affect a wide range of data users in government, business, and academia, the ECPC is soliciting comments on the advisability and desirability of making similar changes to the structure of NAICS for 2012. Specifically, the ECPC is soliciting comments on the desirability of reducing the number of detailed national (six-digit) U.S. manufacturing industries while adhering to the structure of the 184 NAICS five-digit industries.

Part III. New and Emerging Industries

NAICS was developed to be a dynamic industry classification. Every five years, the classification is reviewed to determine the need to identify new and emerging industries. The ECPC is soliciting public comments on the advisability of revising NAICS for new and emerging industries in 2012 and soliciting proposals for these new industries.

When developing proposals for new and emerging industries, please note that there are two separate economic classification initiatives underway in the United States. NAICS, the industry classification, is the subject of this notice, while the complementary North American Product Classification System (NAPCS) initiative is also underway. The NAPCS product system described below will complement the NAICS industry system and provide an alternate way of classifying output.

NAICS was developed to classify units according to their production function. NAICS results in industries that group units undertaking similar activities using similar resources but does not necessarily group all similar products or outputs. NAPCS is being developed to classify the outputs of units, or in other words their products or transactions, within a demand-based conceptual framework. For example, the

hypothetical product of a flu shot can be provided by a doctor's office, a hospital, or a walk-in clinic. Because these three units are classified to three different NAICS industries, data users who want information about all flu shots provided must be able to identify the individual products coming out of the units, which NAPCS is designed to do. Thus, in many cases, the need for specific statistical data is better addressed by aggregating product data across industries rather than by creating a new industry. This is particularly true with NAICS, which groups establishments into industries based on their primary production function. Proposals for new industries in NAICS for 2012 will be evaluated within the context of both the industry and product classification systems to determine the most appropriate resolution. For a detailed description of the NAPCS initiative, see the April 16, 1999, **Federal Register** notice (64 FR 18984–18989) available at *http://www.census.gov/napcs*.

Proposals for new industries will be evaluated using a variety of criteria. As previously mentioned, each proposal will be evaluated based on the application of the production function concept, its impact on comparability within North America and with other regions, and its impact on time series. For any proposals that cross three-country levels of agreement, negotiations with Canada and Mexico, our partners in NAICS, will also influence the ECPC's recommendations on those proposals. In addition, other criteria may affect recommendations for adoption. From a practical standpoint, industries must be of appropriate size. At the national level, this is generally not a major concern but there are a variety of statistical programs that produce industry data at the regional, State, MSA, or even county or local level. Proposed industries must include a sufficient number of establishments so that Federal agencies can publish industry data without disclosing information about the operations of individual firms. The ability of government agencies to classify, collect, and publish data on the proposed basis will also be taken into account. Proposed changes must be such that they can be applied by agencies within their normal processing operations. Any recommendations for change forwarded by the ECPC for consideration will also take into account the cost of making the changes. These costs can be considerable and the availability of funding to make changes is critical. The budgetary environment will be considered when the ECPC makes recommendations. As mentioned above, certain proposals may be more adequately addressed through the identification and collection of product data.

Proposals for new or revised industries should be consistent with the production-oriented conceptual framework incorporated into the principles of NAICS. When formulating proposals, please note that an industry classification system groups the economic activities of producing units, which means that the activities of similar producing units cannot be separated in the industry classification system.

Proposals must be in writing and include the following information:

a) Specific detail about the economic activities to be covered by the proposed industry, especially its production processes, specialized labor skills, and any unique materials used. This detail should demonstrate that the proposal groups establishments that have similar production processes that are unique and clearly separable from the production processes of other industries.

b) Specific indication of the relationship of the proposed industry to existing NAICS United States six-digit industries.

c) Documentation of the size and importance of the proposed industry in the United States.

d) Information about the proposed industry in Canada and Mexico if available.

Proposals will be collected, reviewed, and analyzed. As necessary, proposals for change will be negotiated with our partners in Canada and Mexico. When this process is complete, the OMB will publish a **Federal Register** notice that contains the ECPC recommendations for additional public comment prior to a final determination of changes to NAICS for 2012.

Part IV. Changes to Account for Errors and Omissions in NAICS 2007

No significant errors or omissions have been identified in NAICS. Any errors or omissions that are identified in the future will be corrected and posted on the official NAICS Web site at *http://www.census.gov/naics*.

Part V. Clarification of Distribution Centers, Publishers' Sales Offices, and Logistics Service Providers in NAICS United States

Clarification on the classification of distribution centers is relatively straightforward. Options might include wholesale trade because of the function of breaking bulk, storage and warehousing because of the characteristics of the facilities, or even trucking terminals as cross-docking practices develop and improve. Sales offices of publishers could be classified either to publishing or to wholesale trade. Classification of logistics services may hinge on the treatment of outsourcing or the separate identification of logistics products.

Clarification of the classification of these units is intended to improve the consistency of classification and the comparability of data from various producers using the NAICS classification. The ECPC is soliciting comments or proposals related to the classification of distribution centers, publishers' sales offices, and logistics service providers for the 2012 revision.

Part VI—Clarification of the Treatment of Manufacturing Units That Outsource Transformation

The structure and organization of many businesses engaged in the production of goods continues to change as they attempt to increase efficiency and reduce costs by employing new and improved processes. One very noticeable and rapidly growing activity is and has been the outsourcing of part or all of the manufacturing production process of goods. The growth in outsourcing of the manufacturing transformation of goods to specialized providers is now quite commonplace as firms continue to explore new paths to increase revenues and reduce costs of production. The expansion of competition globally and the formation of highly specialized business activities create unique problems for an industrial classification system such as NAICS. When producers subcontract portions of the production process to separate affiliated or unaffiliated units, the production function changes at the establishment level. As described in Parts I and III, above, the production functions define the industries in NAICS to the extent possible.

In this particular case, NAICS United States 2007 does not provide clear or adequate guidance on the classification of units that perform only part of the complete production process for goods. Further, because there is no clear guidance for NAICS to provide a consistent and transparent classification framework for the development of comparable statistics across programs and agencies, differences in classification practices across programs may lead to erroneous signals on the direction of the economy that could potentially result in faulty policy decisions. For example, if employment is classified in manufacturing in one

program while the associated output is classified by another program in wholesale trade, estimates of productivity and GDP may potentially provide erroneous signals if the differences are not well understood and accounted for when developing the relevant statistics.

Because of this concern, the Economic Classification Policy Committee (ECPC) chartered a Manufacturing Transformation Outsourcing Subcommittee to review options for the consistent classification of establishments that outsource manufacturing transformation. The ECPC is soliciting public input to assist the subcommittee in its work.

As noted earlier in this document, NAICS is based on a production-oriented or production function conceptual framework. A production function describes any economic activity in which inputs, such as the services of types of labor and capital equipment, raw and intermediate materials, and, in many cases, intangible inputs such as intellectual property are used to manufacture a material good or to render a service.[1]

In describing the production process, the preliminary work of the subcommittee has identified three general types of units involved in the production of goods: (a) Traditional or integrated manufacturers, (b) manufacturing service providers, and (c) ''factoryless'' goods producers.[2] Below we broadly define and list the characteristics of these units:

A. Traditional or Integrated Manufacturers

The traditional or integrated manufacturer utilizes inputs such as capital, labor, and energy to transform material inputs into a new product to be sold. Characteristics of integrated manufacturers include:

- Performs transformation activities;
- Owns rights to the intellectual property or design (whether independently developed or otherwise acquired) of the final manufactured product;
- Owns the product they manufacture;
- Controls and facilitates the production process; and
- Sells the final product.

An integrated manufacturer can provide a full accounting of input costs and output values.

B. Manufacturing Service Providers

The manufacturing service provider provides contract manufacturing services—defined tasks specified by a contract—that utilize inputs such as capital, labor, and energy to transform material inputs according to the contract specifications. Characteristics of manufacturing service providers include:

- Performs transformation activities;
- Receives contract to perform transformation activities;
- Does not own rights to the intellectual property or the design of the new product;
- Does not own the manufactured products contracted to produce;
- Controls the facility but does not control the production process (i.e., the manufactured product is made to the contract's specifications); and
- Does not sell the final product.

The manufacturing service provider can provide information on the value of the contract work, the types of transformation activities it performed, and the value of the labor and the plant and equipment utilized in the transformation activities. However, this type of provider cannot report the market value of the final product.

C. Factoryless Goods Producers

The factoryless goods producer outsources all of the transformation steps that traditionally have been considered manufacturing, but *undertakes all of the entrepreneurial steps and arranges for all required capital, labor, and material inputs required to make a good.* Characteristics of factoryless goods producers include:

- Does not perform transformation activities;
- Contracts with manufacturing service provider to perform transformation activities to its specifications;
- Owns rights to the intellectual property or design (whether independently developed or otherwise acquired) of the final manufactured product;
- Owns the manufactured product it contracted another establishment to produce;
- Controls and facilitates the production process; and
- Sells the final product.

A factoryless goods provider can provide information on the purchase of the manufacturing service, that is, the cost of the contract, but would not necessarily have production worker payroll or capital expenditures on plant and equipment. However, this type of provider can provide data on the number of units that were arranged to be produced and the market value of the final product.

In reality, businesses producing goods use a variety of strategies that can involve outsourcing some or all of the transformation steps to one or more manufacturing service providers. Substitution of one input for another is inherently part of many production processes within the manufacturing sector. Sector classification does not change if raw materials are produced within a unit or purchased from independent companies. Regardless of whether a manufacturer leases the factory where the transformation occurs or uses its own, it remains classified within manufacturing. If a manufacturer hires independent contractors or uses the services of a professional employer association rather than hiring and managing employees directly, it would remain classified in the manufacturing sector. Input substitution decisions affect the establishment production function but not the overall process of producing goods. A producing unit could be considered as changing the payment method of acquiring the inputs of capital, labor, and materials used in production.

As noted in NAICS United States 2007, units that perform chemical, physical, or mechanical transformation of inputs into new outputs are usually classified in manufacturing. This includes integrated manufacturers and manufacturing service providers that operate factories, plants, or mills, even if they outsource or subcontract some transformation to others. The growth of manufacturing service providers domestically and overseas is the result of traditional integrated manufacturers substituting away from direct expenditures on capital and labor (that is, factories and production workers) to purchases of capital services and labor services and new producers choosing this input mix from the beginning. With the exception of the apparel industries, NAICS classifies integrated manufacturers and manufacturing service providers together by industry. One classification option to consider is whether integrated manufacturers and manufacturing service providers should be separately identified in the structure of NAICS.

As noted above, the classification of units that do not operate factories, plants, or mills, yet are a driving force behind goods being available in the market, is not clearly defined in NAICS. A preliminary review of classification

[1] For more information see The Economic Classification Policy Committee ''Issue Paper No. 1'' *http://www.census.gov/eos/www/naics/history/docs/issue_paper_1.pdf.*

[2] This terminology appeared in a 2004 discussion paper ''Outsourcing Manufacturing Activities—Measurement and Classification Implications'' by John Murphy, Assistant Division Chief for Classification Activities at the United States Bureau of the Census.

choices for factoryless goods producers, that is, units that perform all of the entrepreneurial functions of a manufacturer but outsource the actual transformation to one or more partners or manufacturing service providers, was narrowed down to two possibilities by the ECPC. First, these units could be classified within the manufacturing sector because without these units, the goods would not be produced and brought to market. Alternatively, these units could be classified within the wholesale trade sector, because they purchase critical input transformation services from others and are more like a traditional wholesaler who buys and sells goods. In addition, the ECPC considered classification in Sector 54, Professional, Scientific, and Technical Services, because factoryless goods producers could produce their own designs or intellectual property. However, unless the designs or intellectual property are sold or licensed to others, the production would not be measurable as manufactured output. Further, factoryless goods producers could acquire designs or intellectual property developed by others, thus bearing no resemblance to research and development units. The ECPC also considered classification to Industry 551114, Corporate, Subsidiary, and Regional Managing Offices. In this case, a single establishment arranging for and overseeing the production of goods (*i.e.*, an operating unit) would be classified to the industry defined by enterprise support units or auxiliaries, *e.g.*, central administrative offices in the former Standard Industrial Classification. A single operating unit cannot be a domestic support or auxiliary unit by definition.

Classification of factoryless goods producers to the manufacturing sector would result in the full value of goods, including returns to intellectual property and entrepreneurial risk, being included in manufacturing. Classification to wholesale trade would result in margins that include the returns to intellectual property and entrepreneurial activities, but limit manufacturing to units that are undertaking physical transformation. When the domestic production boundary is crossed, the ability to properly identify transactions for goods and transactions for services will be difficult, yet critical. Once a sector classification for factoryless goods producers is chosen, they could be merged into the existing NAICS industries or separately identified at the industry level.

Classification of factoryless goods producers to either manufacturing or wholesale trade will affect current statistical programs and the estimates that they produce. All of the agencies represented on the ECPC share a concern about the ability to identify and consistently classify factoryless goods producers regardless of the ultimate classification. Beyond that common concern, specific impacts on statistical programs addressing input/output analysis, industry gross domestic product, trade in goods, trade in services, producer prices, productivity, and balance of payments must be considered.

Additionally, the impact on international standards such as the 2008 revision to the System of National Accounts and the Balance of Payments Manual must be considered.

In summary, the ECPC is soliciting public comments regarding the classification of units that outsource all transformation activities within the NAICS system, taking into consideration the framework of existing statistical programs and the interrelationships and interdependencies of economic data produced in the United States.

Susan E. Dudley,

Administrator, Office of Information and Regulatory Affairs.

[FR Doc. E9–60 Filed 1–6–09; 8:45 am]

BILLING CODE 3110–01–P

Reader Aids

Federal Register

Vol. 74, No. 4

Wednesday, January 7, 2009

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6064**
Public Laws Update Service (numbers, dates, etc.)	**741–6043**
TTY for the deaf-and-hard-of-hearing	**741–6086**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **http://www.gpoaccess.gov/nara/index.html**

Federal Register information and research tools, including Public Inspection List, indexes, and links to GPO Access are located at: **http://www.archives.gov/federal__register**

E-mail

FEDREGTOC-L (Federal Register Table of Contents LISTSERV) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **http://listserv.access.gpo.gov** and select *Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings);* then follow the instructions.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC-L and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

Reminders. Effective January 1, 2009, the Reminders, including Rules Going Into Effect and Comments Due Next Week, no longer appear in the Reader Aids section of the Federal Register. This information can be found online at **http://www.regulations.gov.**

CFR Checklist. Effective January 1, 2009, the CFR Checklist no longer appears in the Federal Register. This information can be found online at **http://bookstore.gpo.gov/**

FEDERAL REGISTER PAGES AND DATE, JANUARY

CFR PARTS AFFECTED DURING JANUARY

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.